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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1438

SCHMUTZ MANUFACTURING COMPANY, INC.,
Petitioner.

vs.

DONALD L. ATKINS,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

JOHN P. ARNESS
E. BARRETT PRETTYMAN, JR.
DAVID J. HENSLER
HOGAN & HARTSON
815 Connecticut Avenue
Washington, D.C. 20006

Attorneys for Petitioner

Of Counsel:

FRANK O. MEADE
Meade, Tate & Meade
516 Masonic Building
Danville, Virginia 24541

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 11,566

DONALD L. ATKINS,

Appellant,

versus

SCHMUTZ MANUFACTURING COMPANY, INCORPORATED,

Appellee.

Appeal from the United States District Court for the Western District of Virginia, at Danville.
Ted Dalton, District Judge.

(Decided December 10, 1970.)

Before Haynsworth, Chief Judge, Sobeloff, Boreman, Bryan, Winter, Craven and Butzner, Circuit Judges sitting en banc, on resubmission.

James A. Eichner (George E. Allen, Jr., and Allen, Allen, Allen & Allen on Brief) for Appellant, and Frank O. Meade (Meade, Tate and Meade on Brief) for Appellee.

Filed Dec. 10, 1970. Samuel W. Phillips, Clerk

HAYNSWORTH, Chief Judge:

When this troublesome case first came before this court, a divided panel upheld its summary dismissal on the ground that its maintenance was barred by Virginia's statute of limitation. Treating the law of Virginia as controlling, a majority of the panel held that the running of the statute was not tolled by the filing and pendency of a previous action in the Western District of Kentucky.[1]

Subsequent reconsideration by the court *en banc* resulted in a conclusion by a majority of a divided court that equitable considerations partially foreclosed assertion of the bar of the statute.[2] There followed a petition for further reconsideration and a conclusion by the members of the court that proper disposition of the appeal required treatment by the full court of the initial issue.

We conclude that the tolling effect of the pendency of an identical suit in another federal court is to be determined as a matter of federal, rather than state, law and that the Virginia statute of limitations was tolled by the action brought by Atkins in the Western District of Kentucky. Our conclusion rests principally upon a consideration of the unitary nature of the federal court system. It draws strong support from the fact that in the analagous situation of transfers from one district court to another, after the period of limitation has run, we look to federal law to reach the conclusion that the pendency of the action in the transferor district tolls the running of the statute. By whatever procedural means prosecution of the claim is transferred from one district court to another, the tolling effect of the action in the first district should be determined under the same body of law.

The plaintiff, Atkins, a resident of Virginia, was severely injured while working for his employer in Virginia

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[1] Atkins v. Schmutz Manufacturing Company, 4 Cir., 401 F.2d 731.

[2] These opinions have not been published, and are withdrawn.

when his feet were caught in a machine manufactured by the defendant, Schmutz Manufacturing Company. He alleges that the accident was caused by design and construction defects in the machine. Schmutz is a Kentucky corporation with its sole place of business in that state.

At the time of the accident, Virginia had no long-arm statute, and Atkins' counsel reasonably concluded that personal jurisdiction of Schmutz could not be obtained in Virginia. Consequently, he filed a personal injury action in the United States District Court for the Western District of Kentucky, where Schmutz had its principal place of business. That action was commenced within Virginia's two-year period of limitations for tort actions, but not within Kentucky's one year period of limitation. Extensive discovery and other pre-trial proceedings followed, for everyone reasonably assumed that the applicable limitations period was that of Virginia (the state where the cause of action arose) and not that of Kentucky (the forum state).[3] That assumption was sharply upset, however, when the Kentucky Court of Appeals held that Kentucky's limitation period was applicable in actions brought in the courts of that state if the limitation period of the state where the cause of action arose was longer.[4]

Applying Kentucky's new rule, the District Court for the Western District of Kentucky dismissed the action as time-barred. The Sixth Circuit affirmed,[5] considering itself bound to follow Kentucky's choice of law[6] and thus to

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[3] In the Sixth Circuit this was the settled construction of Kentucky law. Collins v. Clayton & Lambert Manufacturing Co., 6 Cir., 299 F.2d 362, 364; Koeppe v. Great Atlantic & Pacific Tea Co., 6 Cir., 250 F.2d 270; Burton v. Miller, 6 Cir., 185 F.2d 817.

[4] Seat v. Eastern Greyhound Lines, Inc., —— Ky. ——, 389 S.W.2d 908. The decision expressly overruled the earlier decisions of the Kentucky Court of Appeals which had been the basis of the Sixth Circuit's reading of Kentucky law.

[5] Atkins v. Schmutz Manufacturing Company, 6 Cir., 372 F.2d 762.

[6] Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U.S. 487.

apply Kentucky's one year period of limitation,[7] and to do it even in cases previously filed in reliance upon Kentucky's earlier choice of law rule.[8] The Supreme Court denied a writ of certiorari.[9]

In the meantime, Virginia had enacted a long-arm statute under which plaintiff believed personal jurisdiction of the defendant could be obtained in Virginia.[10] Before the Sixth Circuit's mandate became final, this action was commenced in the Western District of Virginia. Dismissal followed upon the ground that Virginia's two year limitation period had run before this action was filed and was untolled by the proceedings in the federal courts in the Sixth Circuit.[11]

In this diversity case, *Guaranty Trust Co.* v. *York*, 326 U.S. 99, compels adoption of the requirement, applicable in the state courts of Virginia, that actions for personal injuries "be brought within two years next after the right to bring the same shall have accrued." [12] Atkins' action against Schmutz accrued when he was injured, *Caudill* v. *Wise Rambler, Inc.*, 210 Va. 11, 168 S.E.2d 257, and he brought an action within two years of that date. But that action was terminated without any decision on the merits, and Schmutz, relying on its interpretation of Virginia law, asserts that its pendency had no tolling effect.

If, in determining the tolling effect of the pendency of the action in the federal courts of Kentucky, we were required, as we are in determining the applicable period of limitation, to follow the state law of Virginia, it is pos-

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[7] Guaranty Trust Company v. York, 326 U.S. 99.

[8] Wetherington v. Griggs, —— Ky. ——, 392 S.W.2d 56.

[9] 389 U.S. 829.

[10] Va. Code Ann. §§ 8-81.1 through 8-81.5. These provisions were enacted in 1964.

[11] 268 F.Supp. 406.

[12] Va. Code Ann. § 8-24.

sible, although not certain, that we would uphold the time-bar. Few cases involving the tolling effect of prior actions have been decided by the Virginia Supreme Court of Appeals, but in a case decided in 1938, *Jones* v. *Morris Plan Bank of Portsmouth*, 170 Va. 88, 195 S.E. 525, that court dealt with a situation somewhat similar to the one before us.

The plaintiff in *Jones* had filed an action against the defendant in the Circuit Court of the City of Suffolk to recover damages for alleged malicious abuse of civil process. Fourteen months later, it was dismissed "for lack of proper venue duly pleaded." [13] Later, Jones asserted the same cause of action against the same defendant in the Circuit Court of the City of Portsmouth. By then, the two year period of limitation had run, unless its running was interrupted by the pendency of the action in the Circuit Court of the City of Suffolk. Construing § 5826 of the Virginia Code (now § 8-34), the Virginia Supreme Court of Appeals found no basis for granting relief to a plaintiff whose prior suit was brought in the wrong forum or was dismissed otherwise than upon the merits.[14]

We cannot be confident, however, that the result in *Jones* would necessarily compel the Virginia Supreme

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[13] 195 S.E. 525.

[14] "An analysis of our statute (section 5826) shows that in only four instances is there a suspension of the statute of limitations by reason of the pendency of a former suit brought in due time. These are: (1) Where such suit abates 'by the return of no inhabitant,' that is, where the writ is not served for that reason; (2) where the suit abates by reason of the 'death or marriage' of a party; (3) where, after the plaintiff has obtained a judgment or decree in his favor, it is 'arrested or reversed upon a ground which does not preclude a new action or suit for the same cause'; and (4) where 'there be occasion to bring a new action or suit by reason of the loss or destruction of any of the papers or records in a former suit or action which was in due time.' "None of these provisions applies to the plaintiff's case. There is no saving provision where a suit, such as that of the plaintiff here, was brought in the wrong forum or was dismissed otherwise than upon the merits." 195 S.E. 526.

Court of Appeals to reach the same result if it were called upon to decide the case before us. Some indication that it might not may be found in the more recent case of *Weinstein* v. *Glens Falls Insurance Co.*, 202 Va. 722, 119 S.E.2d 497. An action was brought within the one year period of limitations to recover on a policy of insurance. During its pendency it was discovered that recovery was unavailable unless the policy were reformed. Reformation could be accomplished only by bringing a separate suit in equity. The equity suit was brought in the same court before dismissal of the law action but more than one year after the loss occurred. The Virginia Supreme Court of Appeals rejected the company's contention that the statute barred the institution of the reformation suit, holding that, as a matter of judicial treatment, the newly filed suit in equity was a continuation of the earlier action at law. There was no reference to the tolling statute, which would not have saved the case.

Virginia's Supreme Court of Appeals has recently indicated its reluctance in deciding statute of limitations questions to reach results which are unjust and inequitable. *Caudill* v. *Wise Rambler, Inc., supra.* Clearly it would be unjust and inequitable in the circumstances of this case not to give a tolling effect to the prior action. Enforcement of the time-bar here would serve none of the underlying purposes of the statute of limitations, and equitable considerations, absent in the *Jones* case, cry for mitigation of the statute's harshness.

Atkins has been diligent and without fault in his efforts to prosecute his claim against Schmutz. His belief that the Western District of Kentucky was the correct forum for litigating the merits of his claim and his belief that he had two years in which to commence his action were entirely reasonable and consistent with established precedents in Kentucky and in the Sixth Circuit.

Nothing Atkins has done or failed to do has prejudiced in any way Schmutz's ability to defend this suit on the

merits. This is not a case where a time lapse between the end of one suit and the commencement of another might cause the defendant to think that the litigation has come to an end. From the initial filing of the complaint in the District Court in Kentucky, these parties have been continual adversaries before one federal tribunal or another pressing their respective claims. More importantly, Atkins asserted his claim in a court of competent jurisdiction within the period prescribed by Virginia and both parties prepared for litigation on the merits.[15] Allowing Atkins to litigate the merits of his claim would not frustrate the oft-stated purpose of statutes of limitations to compel the assertion of a right of action promptly while the evidence is available and still relatively fresh.[16] Al-

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[15] Extensive discovery, resulting in the recording and preservation of evidence, was undertaken by both parties after Atkins filed his suit in the Kentucky District Court. In addition, Atkins was hospitalized for an extended period at the expense, and under the general supervision, of the defendant's liability insurance carrier, which was also the workmen's compensation insurance carrier for Atkins' employer. The insurance carrier, which is defending Schmutz, has had an intimate acquaintance with the claim and the nature and extent of the plaintiff's injuries from a date shortly after the accident.

[16] "Statutes of limitation are statutes of repose, the object of which is to compel the exercise of a right of action within a reasonable time. They are designed to suppress fraudulent and stale claims from being asserted after a great lapse of time, to the surprise of the parties, when the evidence may be lost, the facts may have become obscure because of defective memory, or the witnesses have died or disappeared." Street v. Consumers Mining Corp., 185 Va. 561, 575, 39 S.E.2d 271, 277.

"Statutes of limitation are primarily designed to assure fairness to defendants. Such statutes 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.' Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-349. Moreover, the courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights." Burnett v. New York Central R. Co., 380 U.S. 424, 428.

lowing Atkins to litigate the merits of his claim at this time would be consistent with the basic purpose reflected in the tolling rule—saving the right of action for plaintiffs who, without fault, have been unable to obtain an adjudication on the merits.

This, then, is a case where the parties have obtained the full protection the statute of limitations was designed to afford, and they have obtained it in the precise manner required by the statute—institution of a suit within the prescribed period. Given these considerations, one may doubt whether the Virginia Supreme Court of Appeals would mechanistically follow *Jones* and deny Atkins his day in court.

There is, however, a fundamental and, we think critical difference between the situation in *Jones* and this case —the nature of the judicial systems involved. *Jones*, and the statutory provision under which it was decided, may be accepted as declarations of the law of Virginia with regard to successive actions brought in different courts of that state, but we deal with another, dissimilar judicial system. By its nature this issue never has been and never will be resolved, or even considered, by any court of the Commonwealth of Virginia. Given the differences between the two judicial systems, no one can say with any assurance what Virginia's Supreme Court of Appeals would do if confronted with the question now before us in the context in which it arises.

Virginia's is a highly decentralized, realtively autonomous, system of independent trial courts of sometimes overlapping and duplicating jurisdiction with few administrative or procedural provisions for coordination of their effort or the performance of cooperative or complementary functions. In stark contrast, the federal system is "one great system for the administration of justice" [17]

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[17] Internatio-Rotterdam, Inc. v. Thomsen, 4 Cir., 218 F.2d 514, 517.

with a singularity and a unity which encourages and requires conformity in the functioning of each of the parts to the purposes and objectives of a highly cohesive whole.

The resolution of an essentially procedural issue in one judicial system will not necessarily apply with similar reason when the question comes up in the context of a very different system. The nature, history and traditions of a judicial system have an especially profound influence on the recognition given by one court within that system to earlier proceedings in another court within the system. Occurrences in a highly autonomous court need not always be noticed in another highly autonomous court; but in a unitary system the workings of each part must have their reflections in the whole.

The differences between the two systems would not be so significant had not commencement of the action in the Western District of Kentucky, the defendant's response and the conduct of pretrial proceedings there fully served all of the purposes underlying Virginia's adoption of its two year statute of limitation. Since those purposes have been satisfied, the institutional basis of Virginia's tolling rule becomes critical to a consideration of the applicability of that rule.

On an issue so closely procedural and so intimately involved in the nature and functioning of the federal judicial system, we believe that service of the integrity and needs of that institution should prevail over random guesses about essentially irrelevant state law stemming from different institutional considerations.

Sketches of the two judicial systems will disclose their great differences.

Virginia has a melange of basic trial courts.

Circuit courts are the usual trial courts of general jurisdiction. There is a circuit court for each county, which is also the circuit court of any city of more than

10,000 people within the boundaries of the county,[18] unless a separate circuit court for that city has been created. Twenty-one such cities now have a separate circuit court.[19]

The original jurisdiction of the circuit courts, except those of Richmond and Newport News, extends to all civil and criminal matters, except those triable initially in inferior courts, and except that they have no criminal jurisdiction if the crime was committed within the territorial limits of a city in which there is a corporation or hustings court.[20]

Fourteen of the larger cities have corporation or hustings courts.[21] The subject matter jurisdiction of these courts is generally the same as that exercised by circuit courts.[22] Some cities have a second corporation court of more restricted jurisdiction than the first.[23]

Below the circuit and corporation or hustings courts exist numerous inferior courts with limited, specialized jurisdiction, including county courts, municipal courts, courts of limited jurisdiction ("police courts"), and juvenile and domestic relations courts.[24]

The cities of Richmond, Norfolk, Roanoke, and Newport News have even a larger number of trial courts

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[18] Va. Code Ann. § 17-118.

[19] Va. Code Ann. § 17-117.

[20] Va. Code Ann. § 17-123. The jurisdiction of the circuit courts of the larger cities is fixed by separate statutes. See, for example, the references below to the trial courts sitting in Richmond whose circuit court is one of very specialized jurisdiction.

[21] The cities with corporation or hustings courts are set forth in § 17-135, Va. Code Ann. Most, but not all of these cities also have a separate circuit court. Corporation courts and hustings courts appear to differ in name only.

[22] Va. Code Ann. § 17-139.

[23] Va. Code Ann. § 17-140.

[24] See generally Title 16.1, Va. Code Ann.

with varied jurisdiction. An abbreviated summary of the jurisdiction of the five basic trial courts sitting in Richmond may be illustrative. These are:

1. *The Law and Equity Court of Richmond* which has the same jurisdiction given to circuit and corporation courts, except as to matters of criminal jurisdiction, the probate and recordation of wills, and the appointment and qualification of fiducaries; [25]

2. *The Chancery Court* which has jurisdiction of all suits and proceedings in chancery except those specially cognizable in the *Circuit Court of Richmond*, jurisdiction of all other matters, except matters of common law and criminal jurisdiction, within the jurisdiction of the Circuit courts, and exclusive jurisdiction, within that part of the City of Richmond which lies north of the James River, over probate and registration matters and the appointment, qualification, and removal of fiduciaries; [26]

3. *The Circuit Court of Richmond* which has jurisdiction of criminal matters against convicts, and civil jurisdiction of claims against the state, of claims by the state for money owing, of claims by the state for fines levied upon certain officials and general civil jurisdiction over causes of actions arising within the Capitol Square; [27]

4. *The Hustings Court of Richmond* which has general criminal jurisdiction, except of proceedings against convicts (see *Circuit Court*, above), and civil jurisdiction in actions of forcible or unlawful entry or detainer, in condemnation proceedings and in proceedings to correct erroneous assessments; [28] and

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[25] Va. Code Ann. § 17-164. Prior to 1954 there was also a Law and Equity Court, Part II.

[26] Va. Code Ann. § 17-161.

[27] Va. Code Ann. § 17-163.

[28] Va. Code Ann. § 17-153.

5. *The Hustings Court of Richmond, Part Two* which has jurisdiction concurrent with the *Hustings Court*, except as to proceedings to correct assessments, jurisdiction concurrent with the *Law and Equity Court* of all common law cases, jurisdiction concurrent with the *Chancery Court* of proceedings in equity, and jurisdiction, within that part of Richmond which lies south of the James River (see *Chancery Court*, above) over probate and registration matters.[29]

Essentially, the scheme of the Virginia court system is one of multiple, separate trial courts with sometimes overlapping territorial and subject matter jurisdiction. While there are provisions for the assignment of judges to equalize work loads and while some courts may have more than one judge, there is a strong tendency to give each trial judge his own court. Although the judgments of the various courts are reviewable by the Supreme Court of Appeals of Virginia, the system leaves each of the individual trial courts a marked independence and a special identity of its own.

The federal court system is more simply organized and places greater emphasis on the functioning of the system as a whole. There are some specialized courts, such as the Court of Claims, the Court of Customs and Patent Appeals and the Customs Court, having nationwide jurisdiction, but narrowly confined subject matter jurisdiction. There are subordinate and specialized courts in the District of Columbia and in the territories. The great burden of judicial work of the system, however, is conducted in the District Courts, courts of general jurisdiction encompassing almost the whole of federal jurisdiction itself. In each district there is but one District Court, and the boundaries of many districts coincide with those of whole states. There are only two District Courts in Virginia. Multiple judgeships are the rule, rather than the exception, and every judge of a District is authorized

[29] Va. Code Ann. § 17-154.

to preside over any proceeding within the court's jurisdiction.

For purposes of appellate review and administration, the several district courts are grouped in eleven judicial circuits. With the exception of the District of Columbia Circuit, the Circuits are all multi-district and multi-state. The judgments of the District Courts within each circuit are reviewable by a Court of Appeals of the Circuit, or, with respect to a limited number of proceedings which are thought to require expedition, directly by the Supreme Court of the United States. In addition, the Circuit Councils exercise substantial administrative control over the District Courts within the Circuit and their judges,[30] and the Chief Circuit Judge may assign judges anywhere in the Circuit if the work requires. With the consent of the Chief Justice and the Chief Circuit Judges concerned, such assignments may be made to other circuits.

In a developing sense, the boundaries of a district are not impenetrable walls strictly confining the power of a District Court. Even if the district encompasses only a part of a state, the process of the District Court reaches throughout the state. When additional parties need be brought in, its process may reach out a hundred miles, across district and state boundaries.[31] In interpleader actions, its process reaches throughout the nation.[32]

Relatively liberal provisions for the transfer of cases from district to district permit consolidations for trial[33]

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[30] 28 U.S.C. § 332, 28 U.S.C. § 137. See the discussion by Mr. Justice Harlan, concurring in Chandler v. Judicial Council, 398 U.S. 74, 89, of the important role played by the Circuit Judicial Councils in the management of judicial work in the Federal Court System.

[31] Federal Rules of Civil Procedure, Rule 4(f).

[32] 28 U.S.C. § 2361.

[33] Rule 42(a) of the Federal Rules of Civil Procedure allows consolidation and joint trial of actions involving a common question

and evidence a cooperative functioning of the parts of the system. Recent developments in the handling of multi-district litigation arising out of such things as airline crashes and multitudinous anti-trust claims now permit the consolidation for pretrial processing of all such cases by one judge in one district under the general supervision of a special panel of judges.[34] Duplications and wasteful effort and expense are thus avoided in a system capable of functioning in a unitary manner.

A judgment obtained in one district court may be enforced in another, without formal proof of judgment, by filing a certified copy of the judgment in the district in which enforcement is sought. 28 U.S.C.A. § 1963.

The capacity of the federal courts to function cooperatively led Judge Parker, speaking for this court, to describe the system as "unified" and to approve the transfer of an action, timely filed in the Southern District of New York in the Second Circuit, but where the respondent ship had not been found, to the District of Maryland, where the ship could be attached, though the statute of limitations had run before the transfer.[35] In somewhat similar circumstances, the Supreme Court approved the transfer of a case from the Eastern District of Pennsylvania, where it had been filed but where the defendants could not be "found," to the Southern District

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of law or fact. Transfer of cases from one district to another for purposes of consolidation is possible under 28 U.S.C. § 1404(a) which permits transfer of any civil action for the convenience of the parties and witnesses, in the interest of justice. Cf. Van Dusen v. Barrack, 376 U.S. 612.

[34] 28 U.S.C. § 1407. See Peterson and McDermott, *Multi-district Litigation: New Forms of Judicial Administration,* 56 A.B.A.J. 737.

[35] Internatio-Rotterdam, Inc. v. Thomsen, 4 Cir., 218 F.2d 514. The transfer was held to be permitted under either 28 U.S.C. § 1404(a) or 28 U.S.C. § 1406(a).

of New York where the defendants could be "found." [36] That transfer was made pursuant to 28 U.S.C. § 1406 (a),[37] one of several procedural provisions affording federal court litigants protection against "justice-defeating technicalities." [38]

The problem which confronted the Virginia Supreme Court of Appeals in *Jones* v. *Morris Plan Bank of Portsmouth, supra*, never should have arisen in the federal system. If Virginia's trial courts had been organized as the federal district courts are, if Virginia, as an essential part of that organization, had a statute comparable to 28 U.S.C. § 1406(a), the Circuit Court of the City of Suffolk would never have dismissed the action "for lack of proper venue duly pleaded," unless the action was patently frivolous or harrassing and provided the filing of the action had served the basis purpose of the statute of limitations. In a more unitary system, it would have been transferred by the Circuit Court of the City of Suffolk to the Circuit Court of the City of Portsmouth, and there would not have been a plea of the statute's bar. If the circuit courts of the two cities had been as closely related as are district courts, with all of the mechanical means of promoting the closeness of that relationship, Mr. Jones would not have been remembered in procedural defeat.[39]

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[36] Goldlawr v. Heiman, 369 U.S. 463.

[37] 28 U.S.C. § 1406(a): The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

[38] Internatio-Rotterdam, Inc. v. Thomsen, 4 Cir., 218 F.2d 514, 517. See also, for example, 28 U.S.C. § 1406(c) authorizing the transfer from the District Court to the Court of Claims of cases filed in the former but within the exclusive jurisdiction of the latter.

[39] Although Virginia has a removal statute, Va. Code Ann. § 8-157, which permits some transfers of cases from one court to another, a plaintiff who lays venue in the wrong court will have

In the institutional context in which it arises, this case appears more like *Weinstein* than *Jones*. The institutional considerations emanating from a system of autonomous trial courts which dictated the result in *Jones* were absent in *Weinstein*, where both actions were brought in the same court. It was unnecessary in Weinstein that a second action between the same parties dealing with the same subject matter be treated as entirely independent of the first. It is noteworthy, too, that *Weinstein* does not rely on Virginia's tolling statute for its holding. The tolling statute was just as inapplicable there as in *Jones*. The principal difference between the two cases appears to be that in *Jones*, unlike *Weinstein*, the second action was filed in a different and independent court, which was not required to notice the pendency of proceedings in the first court. In a system of integrally related, cooperating trial courts the result in *Weinstein* and its rationale appear naturally to encompass the *Jones* situation, at least when the second action is filed during the pendency of the first.

We do not attempt an appraisal of the comparative merits of the systems. To say that they are different implies no inferiority of either. Virginia's system has been developed in response to appraisals of her needs, while the federal system has grown responsively to the needs of the national system of courts. The federal system may be no more adaptable to Virginia's needs than Virginia's system would be to national needs. The point is that the resolution of a problem arising out of the nature of one system ought not to control, in a mechanistic way, the resolution of a somewhat similar prob-

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his case dismissed and not transferred. Woodhouse v. Burke & Herbert Bank, 166 Va. 706, 185 S.E. 876; see also Jones v. Morris Plan Bank of Portsmouth, 170 Va. 88, 195 S.E. 525. Simiarly, a case filed in a court which lacks subject matter jurisdiction over the controversy cannot be transferred to the proper court. Valley Turnpike Co. v. Moore, 100 Va. 702, 42 S.E. 675. Compare 28 U.S.C. § 1406(c), cited in note 38, *supra*.

lem when it comes up in the context of a very different system.

In deciding that the question of the recognition to be given by one federal court to proceedings in another federal court should be resolved as a matter of federal law, we do no violence to the doctrine of *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, which requires that federal courts in the diversity jurisdiction decide cases in accordance with state law, whether decisional or statutory. The contours of that requirement have been delineated with increasing clarity by subsequent cases which have made it plain that not every issue arising in a diversity case is governed by state law. *See, e.g., Guaranty Trust Co.* v. *York*, 326 U.S. 99; *Byrd* v. *Blue Ridge Cooperative*, 356 U.S. 525; *Hanna* v. *Plumer*, 380 U.S. 460; *Szantay* v. *Beech Aircraft Corp.*, 4 Cir., 349 F.2d 60.

The essence of our Federal system is the allocation of law-making functions between state and national authorities and the decision in *Erie* was, at least in part, a recognition of the fact that this fundamental governmental scheme is seriously undercut if the federal courts, in serving as a forum for the enforcement of state-created rights, formulate their own rules in areas which are properly matters of state, not federal, concern.[40]

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[40] 304 U.S. 64, 78-80; Bernhardt v. Polygraphic Co. of America, Inc., 350 U.S. 198, 202. See also, Hanna v. Plumer, 380 U.S. 460, 471-472:

> "We are reminded by the Erie opinion that neither Congress nor the federal courts can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution; in such areas state law must govern because there can be no other law."

The extent to which the *Erie* doctrine is constitutionally compelled has been a subject of considerable debate, see the discussion and citations in Wright, *Federal Courts*, 2nd ed. § 56. Since we are dealing with an issue relating to the operation of the federal courts which the Constitution gives the federal government authority to resolve, see Hanna v. Plumer, 380 U.S. 460, 472, that debate is academic for purposes of our decision in this case.

The problem facing the federal courts since *Erie* has been to determine which questions arising in diversity litigation are matters of state concern which should be answered by reference to state law and which questions are matters of federal concern which can be answered by reference to federal law. *Erie* and its progeny may be seen as an attempt to formulate a workable doctrine governing choice of law in diversity actions which would prevent impermissible federal court interference with state rules reflecting policy considerations lying within the realm of state law-making competence. *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 109; *Hanna* v. *Plumer*, 380 U.S. 460, 474 (concurring opinion of Mr. Justice Harlan).

The *Erie* doctrine clearly leaves for determination by the states questions concerning the definition of the basic state-created cause of action, with the federal courts being required to take a position of substantive neutrality. But legal rights are not self-executing, and they can not be viewed in total isolation from the rules governing their judicial enforcement.

It is, of course, neither possible nor necessary for federal courts to be totally neutral in the adjudication of state-created rights. It is not possible simply because federal courts are not protean and are unable to transform themselves into exact replicas of their state counterparts.[41] That state and federal judicial systems are not identic will inevitably mean that the choice of forum will have some effect upon the course of litigation. Some adoption of state court procedures by federal courts sitting in diversity may be feasible, but it may also be in conflict with fundamental interests of the federal courts in the conduct of their own business and the maintenance of the integrity of their own procedures, the legitimate interests of a federal forum, *qua* forum.

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[41] Guaranty Trust Co. v. York, 326 U.S. 99, 108-109; Cohen v. Beneficial Loan Corp., 337 U.S. 541, 555-556.

Literal application of some of the language in *Guaranty Trust Co.* v. *York, supra,* might appear to compel the conclusion that a federal court must apply state law in every case where failure to do so might make a difference in the outcome of the litigation. The language of that opinion, however, has been moderated.[42] Now, in the choice between state and federal law in the disposition of procedural problems such as the one before us, we properly take account of federal interests and the effective functioning of the federal courts as a cohesive, relatively unitary, system for the administration of justice.

In *Szantay* v. *Beech Aircraft Corp, supra,* we described the analysis to be undertaken by a federal court attempting to resolve a federal-state conflict in a diversity case as follows:

> "1. If the state provision, whether legislatively adopted or judicially declared, is the substantive right or obligation at issue, it is constitutionally controlling.
>
> 2. If the state provision in a procedure intimately bound up with the state right or obligation, it is likewise constitutionally controlling.
>
> 3. If the state procedural provision is not intimately bound up with the right being enforced but its application would substantially affect the outcome of the litigation, the federal diversity court must still apply it unless there are affirmative countervailing federal considerations. This is not deemed a constitutional requirement but one dictated by comity." [43]

In order to determine whether Virginia's tolling rule is "intimately bound up with the right being enforced," it would be helpful to know with certainty the state policies underlying the tolling rule. Unfortunately, as in

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[42] Byrd v. Blue Ridge Cooperative, 356 U.S. 525; Hanna v. Plumer, 380 U.S. 460.

[43] 349 F.2d 60, 63-64.

Szantay, there is an absence of evidence from state sources shedding any light on the problem. As pointed out above, however, we think it is clear that to the extent that the purposes of the statute of limitations have been satisfied and the plaintiff has been without fault in not prosecuting his claim to a final judgment, the rule reflects essentially institutional considerations relevant to the administration of justice within the Virginia court system which are unrelated to the basic rights and obligations of the parties. The presence of other considerations is unapparent, while *Weinstein*, treating successive actions in the same court as one, emphasizes the institutional nature of the tolling rule of *Jones*, in which no effect was attributed to the pendency of an earlier action in a different Virginia trial court. In the context of this case, where the only relevant considerations are institutional, Virginia's tolling rule cannot be said to be "intimately bound up with the right being enforced."

That there is a significant federal concern for the application of rules of litigation in federal courts which are consistent with the fundamental nature of that court system is well established. *See, e.g., Byrd* v. *Blue Ridge Cooperative, supra*; *Herron* v. *Southern Pacific Co.*, 283 U.S. 91, 94.

Insofar as federal concerns are involved, this action is, in effect, merely a continuation of the proceedings commenced in the Western District of Kentucky.[44] This is clear from the unitary nature of the federal court system and the procedures it embodies for the expeditious adjudication of cases on their merits.

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[44] See Adams v. Collier, 122 U.S. 382, holding that a suit instituted in the Circuit Court [under the pre-1911 judicial system] after withdrawal of a prior suit on the same cause of action in the District Court was, for statute of limitations purposes, "in effect, a continuation of the former" suit. That the second action is a continuation of the first is precisely the rationale on which the Supreme Court of Appeals of Virginia relied in holding the reformation suit timely in *Weinstein*.

Whether the Kentucky action could have been transferred to the Western District of Virginia under 28 U.S.C. § 1404 is a matter of federal law.[45] If this action had initially laid venue in the wrong district, its transferability under 28 U.S.C. § 1406(a), after the running of any applicable statute of limitations, would be determined as a matter of federal law.[46] Implicit in a decision that there should be a transfer after the lapse of two years following the injury is a determination that the basic purpose of the applicable statutue of limitations has been satisfied and that the interests of justice dictate against dismissal.[47]

Though here there was no transfer of the action in the Western District of Kentucky and the question of its transferability was not raised, the commencement of this action in the Western District of Virginia during the pendency of the Kentucky action has achieved the same practical result. A determination of the tolling effect of the commencement and prosecution of the federal action in the Western District of Kentucky ought to be had under the same body of law regardless of the procedural means by which prosecution of the substantive cause of action is discontinued in the district court sitting in

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[45] Compare Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509, a diversity case in which the Supreme Court declined to decide whether a pre-§ 1404 *forum non conveniens* transfer was governed by state or federal law, *with* Sullivan v. Behimer, 363 U.S. 335, a diversity case in which the Supreme Court treated a transfer pursuant to § 1404 entirely as a matter of federal statutory interpretation. *See also,* Van Dusen v. Barrack, 376 U.S. 612; Internatio-Rotterdam, Inc. v. Thomsen, 4 Cir., 218 F.2d 514.

[46] Cf. Goldlawr v. Heiman, 369 U.S. 463.

[47] "When a lawsuit is filed, that filing shows a desire on the part of the plaintiff to begin his case and thereby toll whatever statutes of limitation would otherwise apply. The filing itself shows the proper diligence on the part of the plaintiff which such statutes of limitation were intended to insure." Goldlawr v. Heiman, 369 U.S. 463, 467.

Kentucky and continued in a district court sitting in Virginia.

Since Virginia's tolling statute and state decisions construing it have been so largely influenced by the nature and the structure of Virginia's system of trial courts, since the question here arises out of a different system and reasonable answers are dependent upon the nature and the structure of that system and its effective functioning, we conclude that we must seek the answer as a matter of federal, not state, law. Since every purpose of Virginia's proscription against the commencement of tort actions more than two years after the injury has been served, we conclude that, as a matter of federal law, the statute has been satisfied.[48]

The judgment is reversed and the case remanded with instructions to overrule the plea of the statutory bar.

Reversed and remanded.

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[48] It is suggested in the concurring opinion that any consideration favoring the application of a federal tolling rule would equally favor the application of a federal statute of limitations. Whether or not Congress could validly enact such a statute for diversity cases, it has not done so. We need not resurrect the indefinite, cumbersome doctrine of laches as the only limitation on the commencement of actions in the diversity jurisdiction. State statutes provide a convenient, predictable period of limitations for use in the diversity jurisdiction, and resort to them minimizes the disparity of results of litigation in state and federal courts. If *Guaranty Trust* has no constitutional foundation, as long as there is no federal statute of limitations, its result would be dictated by institutional considerations.

In the federal system, the tolling effect of an earlier action in a federal court is a very different question than the one resolved in *Guaranty Trust*. Adoption of a state's statutory period of limitation is not inconsistent with our conclusion that recognition in a federal court of earlier proceedings in another federal court should be determined as a matter of federal law.

We accept and apply *Guaranty Trust*, but we do not extend it to require federal adoption of a state tolling rule, born of state court institutional considerations which have no relevance in the context of the federal system.

WINTER, Circuit Judge, specially concurring :

I concur in the judgment of the Court because I think that state law requires reversal and remand. We need not and should not decide more.

Following plaintiff's petition for further reconsideration, counsel have referred us to *Weinstein* v. *Glens Falls Insurance Co.*, 202 Va. 722, 119 S.E.2d 497 (1961), decided after *Jones* v. *Morris Plan Bank of Portsmouth*, 170 Va. 88, 195 S.E. 525 (1938), on which we relied for affirmance in our original decision. In *Weinstein* an action at law on a policy of insurance was commenced within the one year period of limitations for actions at law or in equity specified in the policy. The contractual period of limitations was required to be included in the policy by Virginia statute. Neither the statute nor the contract contained any provision for its tolling. During the course of the litigation, it became apparent that the court in which the action had been instituted was not competent to grant relief. To warrant recovery, reformation of the contract, an action cognizable solely in an equity court in Virginia, would be required. An action in equity was then instituted. It was filed before final disposition of the action at law but more than one year after the loss occurred. When the insurer contended that the equitable action was barred by limitations, the Virginia Supreme Court of Appeals rejected the contention. It ruled that "the chancery suit was but a continuation of the claim asserted in the law action which was concededly brought in time, and the statute having stopped running upon the institution of the law action, the suit in chancery was not barred." 119 S.E.2d at 503.

To me, *Weinstein* is dispositive of this appeal. Plaintiff's suit was instituted in Kentucky before the expiration of two years prescribed by the applicable Virginia statute. The Kentucky court, bound by Kentucky's *ex post facto* determination that Kentucky public policy pro-

hibited giving effect to foreign statutes of limiations more liberal than that of Kentucky, was not competent to consider the merits of the suit. Plaintiff's suit in Virginia was instituted before the Kentucky action was terminated. Indeed, suit was filed in the Western District of Virginia before the mandate of the United States Court of Appeals for the Sixth Circuit issued and more than six months before the Supreme Court denied certiorari. See *Burnett* v. *New York Cent. R. Co.*, 380 U.S. 424, 435 (1965). I have no difficulty in concluding that the Virginia suit was "but a continuation" of the previously filed Kentucky action, timely under Virginia law, and, therefore, the Virginia statute of limitations interposed no bar.

Inexplicably, the opinion in *Weinstein* made no reference to the earlier decision in *Jones*. We are told, also, that no reference to *Jones* was made in the briefs filed in *Weinstein*. Whatever our views with regard to conflict between the two decisions, *Weinstein*, as the latest expression of Virginia law, is entitled to be followed. Reconciliation, if any is needed, is for the state courts in an appropriate case, not us.

We ought not to decide more than that the present suit is not barred by limitations under Virginia law. The parties have agreed that, under *Guaranty Trust Co.* v. *York*, 326 U.S. 99 (1945), we must look to the law of Virginia to decide this case. *Guaranty Trust* held that, in a diversity action like that at bar, we must look to the state law to determine the period of limitations. The court purportedly accepts this proposition, but seeks to avoid its logical consequences by finding that the *tolling* of limitations is a matter of federal law. While *Guaranty Trust* did not concern the *tolling* of limitations, tolling is so clearly the obverse of the same coin that I think we are bound to Virginia law and are foreclosed from fashioning a federal rule.

Certainly, *Guaranty Trust* has not been sufficiently eroded in whole or in part that we should refuse to follow it; nor, in my estimation, has a satisfactory way been devised by the court to avoid it. The decisions of the Supreme Court in *Byrd* v. *Blue Ridge Cooperative*, 356 U.S. 525 (1958), and *Hanna* v. *Plumer*, 380 U.S. 460 (1965), do provide a basis for applying a federal rule of law in a diversity case under certain circumstances, but the rationale of those two cases does not support a further departure from the principles of *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), under the facts presented here. *Byrd* (factual issue must be decided by a jury in a federal court) and *Hanna* (service of process in federal actions must meet the standards of the Federal Rules of Civil Procedure) were dictated by strong expressions of federal policy: the Seventh Amendment and the Federal Rules of Civil Procedure, respectively. In contrast to these Constitutional and Congressional mandates, here we have only a notion of an "institutional interest" in the uniform management of the federal court system. If this interest is sufficient to support a federal rule of tolling, I suggest that it favors the application of a federal statute of limitations just as strongly, so that by implication *Guaranty Trust* is being overruled. I note, also, that there is lacking in this case any discriminatory state policy of the type intended to be prevented by the creation of federal diversity jurisdiction so that there would be justification for noncompliance with state law. *Szantay* v. *Beech Aircraft Corp.*, 349 F.2d 60 (4 Cir. 1965).

To me, it is, therefore, unwise to impugn the vitality and scope of *Guaranty Trust* when the law of Virginia alone provides the result.

Judge Sobeloff authorizes me to say that he joins in this opinion.

APPENDIX B

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 11,566

DONALD L. ATKINS,

Appellant,

vs.

SCHMUTZ MANUFACTURING COMPANY, INCORPORATED,

Appellee.

Appeal from the United States District Court for the Western District of Virginia, at Danville.
Ted Dalton, District Judge.

(Decided April 17, 1969).

Before Haynsworth, Chief Judge, Sobeloff, Boreman, Bryan, Winter, Craven and Butzner, Circuit Judges sitting en banc, on resubmission.

James A. Eichner (George E. Allen, Jr., and Allen, Allen, Allen & Allen on brief) for Appellant, and Frank O. Meade (Meade, Tate and Meade on brief) for Appellee.

Albert V. Bryan, Circuit Judge:

Whether a plea of limitations should be excluded in this personal injury action is the point on appeal. Donald R. Atkins, in the employ of the U. S. Plywood Company at South Boston, Virginia, was injured on June 22, 1961 when using as intended a machine made by Schmutz Manufacturing Company, the defendant, from whom Plywood had purchased it. It cost him both legs. Claiming damages, Atkins put his tragedy upon the negligence of Schmutz in the machine's design and construction. Finding the action came too late under the Virginia limitation act, the District Court dismissed. We reverse. The plea should have been enjoined or disallowed as inequitable.

Schmutz had no place of business or agent in Virginia and Virginia's long-arm statute was not enacted until three years afterwards, in June 1964.[1] Suit was first begun in the United States District Court in Kentucky on June 19, 1963, three days before the running of Virginia's two-year limitation.[2] Kentucky's period for such an action was one year,[3] but as long understood by the State and Federal courts there, it yielded to the greater indulgence, if any, of the State of the injury.[4] However, this impression was disavowed by Kentucky's courts while Atkins' case was pending[5] and the new order made retroactive.[6]

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[1] Code of Va., 1950, as amended, Section 8-81.2 .

[2] Code of Va., 1950, as amended, Section 8-24.

[3] KRS § 413.140.

[4] Collins v. Clayton & Lambert Manufacturing Co., 299 F.2d 362, 364 (6 Cir. 1962); Koeppe v. Great Atlantic & Pacific Tea Co., 250 F2d 270 (6 Cir. 1957); Burton v. Miller, 185 F2d 817 (6 Cir. 1950).

[5] Seat v. Eastern Greyhound Lines, Inc., 389 SW2d 908 (Ky. 1965).

[6] Wethington v. Griggs, 392 SW2d 56 (Ky. 1965).

This turnabout in precedent occurred with Atkins' cause at the trial stage. The District Court in Kentucky dismissed upon the one-year statute and was affirmed on appeal. Atkins v. Schmutz Mfg. Co., 372 F2d 762 (6 Cir. 1967) cert. den. 389 US 829 (October 9, 1967). Before the mandate of affirmance issued, Atkins commenced this action in Virginia on March 13, 1967—almost six years after the injury—laying summons on Schmutz under the new long-arm law. The action fell on the plea of the Virginia two-year limitation interposed for Schmutz by its liability insurer.

Dismissal of Atkins' suit shocks the conscience, as the trial judge recognized but saw no escape. We think rejection of the plea is demanded by the attending equitable considerations. The amputee is denied trial of his claim despite his strenuous vigilance to get a hearing. His defeat is accomplished by resort to a statute of limitations. Laws of this kind have always been merely to give assurance against stale or ancient claims, lest the defense be impeded by disappearance of proof through lapse of time. Here the statute defies plaintiff's alacrity. True, he waited two years, but never to the defendant's prejudice. At all times it was aware of Atkins' hurt. Postponement of the institution of personal injury actions is not uncommon; it allows an opportunity both for compromise and for further study of the permanence of the injury.

Utterly unforseeable to the plaintiff was the about-face of the Kentucky State court. Of course this destruction of his claim would have been avoided had he sued sooner, but never was there an inkling of the necessity. Defendant's absence compelled him to sue in Kentucky.

I. Key to relief is that Atkins as plaintiff and Schmutz as defendant had the same insurer, Liberty Mutual Insurance Company. It carried the insurance of Plywood required under the Virginia Workmen's Compensation

Act [7] and thus insured Atkins as an employee; it was, too, the liability insurance carrier of Schmutz. Throughout, it was both a co-plaintiff and a co-defendant. As a plaintiff, it sought reimbursement of what it had advanced pursuant to the Plywood policy and a supplement thereto. In defense it sought to save itself as insurer of Schmutz. The history of this case exposes the ensuing prejudice to Atkins.

As just intimated, he applied for and accepted workmen's compensation. He could, also, sue the third-party tort-feasor for his injury. However, under the Act when demand is made by an employee upon his employer for the statutory benefits it "shall operate as an assignment to the employer of any right to recover damages which the injured employee . . . may have against [the tortfeasor] . . . and such employer shall be subrogated to any such right and may enforce . . . the legal liability of [the tortfeasor]. . . . [But] any amount collected by the employer . . . in excess of the amount paid by the employer . . . shall be held by the employer for the benefit of the injured employee . . . less a proportionate share of such amounts as are paid by the employer for reasonable expenses and attorney's fees. . ." [8]

If an insurer, as here, satisfies the benefactions of the statute, then all the privileges of the employer are automatically assigned to the insurer, including the right to reimbursement for the items enumerated in the foregoing excerpt from the Act.[9] Insistence upon indemnification of Liberty by Atkins is also found in the agreement Liberty exacted of Atkins for payment of extra-statutory benefits. The action may be brought by the insured or the insurer in the name of either. Hence it is

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[7] Va. Code 1950, 65-1 et seq., as revised 65.1-1 et seq. (1968).

[8] Va. Code 1950, 65-38, as redesignated, 65.1-41 (1968).

[9] Va. Code 1950, 65-108, as redesignated, 65.1-112 (1968).

a suit for the use of both the employee and the insurer, but primarily for the latter and secondarily for Atkins. The insurer, thus, is a co-plaintiff, whether named or not. In the instant facts, Liberty is defending Schmutz and so is in reality a defendant.

II. In remarkably like circumstances Czaplicki v. The Hoegh Silvercloud, 351 US 525, 531 (1956), held that the equities in favor of the apparently prejudiced insured should be looked to as well as the rigid literality of a pertinent statute. In consequence, he was permitted to maintain a suit despite the express statutory transfer of the right of action to his insurer.

Recalling that Liberty holds title to Atkins' claim, the following excerpt from *Czaplicki* indicates its resemblance to our case: ". . . an action by Travelers [the insurer] would, in effect, be an action against itself, . . ." 351 US 531. *Czaplicki* is cited only to authenticate the duty and power of a court to exert an equitable discretion to foster the interests of the injured insured. The opinion refrained from declaring, as unnecessary, the relation between the insurer and insured, when the tortfeasor is sued for their several benefits, to be a trust, but in joining, Justice Frankfurter conceived of it that way. Other decisions enunciate this concept. It was the view of the concurring judge in Potomac Electric Power Company v. Wynn, 343 F2d 295, 299 (D.C. Cir. 1965). Earlier, this had been the concept of Learned Hand, C.J., United States Fidelity & Guaranty Co. v. United States, 152 F2d 46, 48 (2 Cir. 1945).

Advertently or inadvertently, Liberty has put itself into a fiduciary category, a realm historically dominated by equity. It would discountenances resort to the statute of limitations wherever seen to be inequitable or unconscionable. Marine Insurance Co. v. Hodgson, 11 US (Cranch) 331, 336 (1812); La Porte v. United States Radium Corp., 13 FSupp. 263, 273 (D.N.J. 1935); Bruns-

wick Land Corp. v. Perkinson, 153 Va. 603, 151 SE 138 (1930).

The insurer's duty to avoid prejudice to the employee's recovery goes back to Liberty's policy insuring Plywood under the Virginia Workmen's Compensation Act.[10] While this document is not in the record, necessarily it is available to Atkins as a beneficiary. It must be read, too, as forbidding interference with Atkins' enforcement of his claim. Just as the employee cannot debase the insurer's rights of subrogation and indemnity against the wrongdoer,[11] so neither the employer nor the insurer can prejudice the employee's rights.[12] It is incumbent upon the employer and insurer to observe this commandment faithfully.

III. Notwithstanding, Liberty through its dualism has thwarted Atkins' recovery in Kentucky and in Virginia, and to the advantage of Liberty. Liberty is so postured that if Atkins loses, Liberty is saved the possibility of paying any more than the expenditures it has already made for Atkins. It is an encouragement for Liberty to oppose Atkins, just as it has. Obviously, this is in violent contravention of Liberty's duty under the Virginia law not to hinder Atkins, certainly not to its own advantage.

Justification urged for Liberty's position is that in pleading the statute, it is doing no more than Schmutz could have done. The answer is that the real defendant, of course, is Liberty and it is bound to Atkins as Schmutz is not. Liberty cannot recast its actual part by acting in the shadow of Schmutz. Equity must correct the injustice.

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[10] Va. Code 1950, 65-109, as redesignated 65.1-113 (1968).

[11] Stone v. Heline Co., 184 Va. 1051, 37 SE2d 70 (1946).

[12] C. & O. Ry. Co. v. Palmer, 149 Va. 560, 140 SE 831 (1927).

IV. Our decision to strike the limitation plea does not rest on estoppel. It is placed on the jurisdiction of equity, noted in *Czaplicki*, supra, 351 US 525, and elsewhere cited, to prevent imposition upon the insured when, as here, there are breaches by the insurer of its ties to the insured. Especially is this the aim when the abandonment of the insured is due to a conflict of the company's interests with the individual's.

V. At once arises the query of why did not Atkins raise the present contention in the Federal court in Kentucky. Explanation is immediately at hand. From the day of his injury, June 22, 1961, until October 1963, he was not informed of Liberty's interest in Schmutz, and then only by chance. The limitations of both Kentucky and Virginia had by that time matured, although the plea was not filed until November 1963.

Naturally, the next inquiry is why Atkins did not, after learning that Liberty was also Schmutz' insurer, dispute the limitation defense. The answer is quite adequate. Atkins' attorneys in opposing Liberty as Schmutz' champion were cautious not to jeopardize Liberty's obligatory rehabilitative care of Atkins. It was owing him by virtue of the Virginia statute and the supplemental agreement. A consideration in this regard was whether if in the Kentucky trial Atkins resisted Liberty's medical evidence on damages, he might be charged with hampering and not cooperating with his insurer. On that ground, his entitlements to restorative treatments might be denied. In this connection, it is notable that the supplemental agreement stipulates that the benefits it provides are those "which in the opinion of the Company are reasonably necessary." Incidentally, Liberty gained complete medical evidence upon Atkins through its care of him. The Schmutz-Liberty defense was profited by Liberty's relationship to Atkins.

Termination of the required reparative measures would have meant a serious and severe loss to Atkins. Atkins

had been receiving medical and hospital attention from Liberty ever since the day of his accident. From time to time for that purpose he was taken by Liberty to its center in Boston, Massachusetts. This solicitude ceased just after Atkins filed his suit in Virginia in March 1967 —whether as a consequence of this step or as "in the opinion of the Company" was no longer necessary, does not appear in the record.

The same fear possibly accounts for the absence of any fight on the limitation plea. Intended or not, Liberty's Janus-capacity put a "squeeze" on Atkins, either to forego a replication with an assault on the plea or lose the medical attention.

VI. Res judicata or estoppel by judgment is not a defense here. The Kentucky Federal court's judgment dealt only with the Kentucky statute. Concededly, the statute has no extraterritorial force and is not a consideration in applying the Virginia laws. Furthermore, a decision on a statute of limitations of this kind is not a resolution on the merits of the controversy. For these reasons the dismissal on that ground is not effective beyond Kentucky.

Rule 41(b) F.R.Civ. P.[13] has been cited as requiring, in some situations, that a dismissal on the statute of limitations by a Federal court in one State be given res judicata-effect in a subsequent case in a Federal court in another State as a dismissal on the merits. See Bertha Building Corp. v. National Theatres Corp., 248 F2d 833, 840 (2 Cir. 1957) disapproving Warner v. Buffalo Drydock Co., 67 F2d 540 (2 Cir. 1933) cert. den. 291 US 678 (1934); Murphy v. A/S Sobral, 187 FSupp 163, 164

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[13] (b) Involuntary Dismissal: Effect Thereof . . . . Unless the court in its order of dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

(S.D.N.Y. 1960). But this is not the prevalent view. Moore's Federal Practice, 2d Ed., p. 1033; cf. Costello v. United States, 365 US 265, 285 (1961). The insignificance of the point presently is obvious when it is recalled that Atkins could have sued the second time in a Virginia State court without this obstruction.

VII. Equity powers aside, intervention in the utilization of the Virginia act of limitations does not affront her precedents. While it was said, in Brunswick Land Corp. v. Perkinson, supra, 153 Va. 603, 151 SE 138, 140 (1930), that the act provides its only exceptions, the decision recognizes the possibility of other exceptions under "certain extraordinary circumstances, wherein the positive and plain requirements of an equitable estoppel preclude its application". Wilson v. Butt, 168 Va. 259, 190 SE 260 (1937).

VIII. Exoneration from the predicament in which Liberty now finds itself is not suggested by the question of how far Liberty's duality withdraws the defenses of Schmutz-Liberty. The ready response is that equity has a discretion in lending its aid. It is justified at this time only with respect to the employment of the limitations act, which is quite different from a stand taken on the merits; it is only a means of escape.

IX. The contention is pressed that Liberty would be damaged in the sale of insurance if it is to be restricted in its defenses when a contest develops between two of its insureds. Automobile liability and collision policies are mentioned as examples. Frequently it may develop, it is said, that the same insurer has written these contracts for the plaintiff as well as for the defendant, and under our decision difficulties for the insurer are to be anticipated, particularly in the event of counterclaims. This is quite true, but it is a possibility arising from the generality of the insurance business, not from the fault of the insured. It is Liberty's concern alone. 18 ALR

3rd 482. Certainly the problem is not solved to the prejudice of the insured.[14]

Liberty is not accused or thought of by the court as purposely resorting to a bifold position to advantage itself or Schmutz. There is not the slightest basis for such an imputation. Undoubtedly overlooked by Liberty was the prejudice to Atkins reflected by its twin character. The point is, however, that we must look to the result, and not to the intendment, of the insurer's twoness.

X. The record does not disclose the terms or limits of Liberty's insurance of Schmutz, but to the extent that Schmutz is not protected, our decision presently shall not preclude Schmutz from interposing the plea of limitations in respect to the amount of any judgment obtained by Atkins which is not covered by Liberty's policy. Schmutz did nothing to prejudice Atkins in the prosecution of his claim and there is no equitable ground for denying it this defense.

It appears that in regard to the running of the statute there is no jury issue. If that is true, then at the trial the Court will apply our decision to Liberty and Schmutz to the extent of Liberty's obligation to indemnify Schmutz, and apply it to Schmutz separately as to any unindemnified liability. The point would not go to the jury in any manner.

The District Court's order of dismissal will be vacated and the previous opinion of the majority of this court

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[14] It has been suggested, too that the present situation has existed for years, without disapproval, when a longshoreman claims workmen's compensation from his employing stevedore for injury aboard ship. The analogy drawn is this: under the stevedore's policy the insurer pays the claim; neither the longshoreman, nor the insurer in his name, can sue the stevedore, but they can and do sue the ship; thereupon the ship impleads the stevedore; and the insurer defends the stevedore. No conflict is present in the position of the insurer. Throughout, the insurer claims *with* the longshoreman and the stevedore against the *ship*, and defends the stevedore on the *ship's* claim. The insurer never takes the side of the ship against the longshoreman.

will be withdrawn. On remand Liberty should be made a party defendant, as recommended in *Czaplicki*, supra, 351 US 525.[14] The plaintiff will be permitted to amend his complaint to effectuate our determinations and Liberty given leave to answer.

The District Court will suspend or enjoin the intervention of Schmutz-Liberty's plea of the statute of limitations insofar as it may relieve Schmutz and Liberty of liability for the indemnity provided Schmutz under Liberty's insurance policy. But the statute may be pleaded by Schmutz against recovery by Atkins of any amount for which it is not covered by Liberty's policy. The action will then go to trial without this defense.

Vacated and Trial Ordered.

CRAVEN, Circuit Judge, concurring:

With Chief Judge Haynsworth, I regret the refusal of the court to reconsider en banc the merits of the *Erie* question. I would prefer to reverse on *Erie* grounds as stated in my dissent from the panel decision, 401 F.2d 734, but have no hesitation in joining in Judge Bryan's opinion.

WINTER, Circuit Judge, with whom HAYNSWORTH, Chief Judge, joins, dissenting:

By a tour de force the majority achieves what may be considered a just result on the particular facts of an

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[14] Liberty was initially a party defendant in a separate count in the Kentucky case, but not to the cause of action pleaded against Schmutz. Recovery was sought on the allegation that Liberty "either gratuitously or by virtue of the provisions of a policy of insurance" with Plywood had undertaken, but failed, to maintain a safety inspection of Plywood's plant machinery. Liberty was voluntarily dropped from the suit by Atkins under this count.

appealing case. It does so by ignoring the shackles of state law which attach to our diversity jurisdiction and by embroidering on the basic fact that Liberty Mutual Insurance Company was the insurer for both plaintiff and defendant. However commendable the result in the instant case, it is unsupported by any authority, and the precedent which the opinion establishes has a disturbing and far-reaching adverse effect on well-established principles of insurance law.

True, Liberty Mutual was workmen's compensation insurer for plaintiff's employer and by paying workmen's compensation benefits to plaintiff succeeded to plaintiff's cause of action, if any, against the defendant, its other insured. But this duality, standing alone, serves as no basis to provide equitable relief. *Czaplicki* v. *The Hoegh Silvercloud*, 351 U.S. 525 (1956), is no authority for the result reached here. It held only that in the circumstances where the same insurer was subrogee of plaintiff and liability insurer of the marine contractor whose fault was alleged to have caused plaintiff's injuries, plaintiff could maintain his own action against the third-party tortfeasor notwithstanding subrogation. In the instant case, this is the very thing that plaintiff has done, and defendant has never challenged plaintiff's right to sue, if suit were timely. Significantly, *Czaplicki* was remanded for an evidentiary hearing as to whether the insurer by action or inaction justified plaintiff's delay in bringing suit so as to excuse plaintiff from the defense of laches, or whether the insurer suffered prejudice by the delay, a significant factor in regard to laches but not in regard to limitations. In the instant case, the majority is unable to point to any action or nonaction on the part of Liberty Mutual which would provide a shadow of a claim that Liberty Mutual waived or should be estopped from pleading limitations.

Even if the "fiduciary" or "trustee" relationship stated by Mr. Justice Frankfurter in concurring in *Czaplicki*,

or Judge Wright in his concurrence in *Potomac Electric Power Company* v. *Wyman*, 343 F.2d 295, 299 (D.C. Cir. 1965), or Judge Learned Hand in *United States Fidelity & Guaranty Co.* v. *United States*, 152 F.2d 46 (2 Cir. 1945), is invoked, the result reached by the majority should not stem therefrom, absent a showing of something more than the mere fact of the relationship. While Liberty Mutual arguably has a fiduciary relationship to plaintiff, it has a fiduciary relationship to defendant also. Undoubtedly it covenanted to defend defendant and it may well be that the covenant to defend exists in the context of a policy limitation of liability well below the substantial damages that plaintiff may be expected to prove if liability is established. The record does not disclose the limits of defendant's policy, but Liberty Mutual's obligation to defendant should not be lightly subordinated to its obligation to plaintiff. The only satisfactory basis on which Liberty Mutual's obligation to plaintiff should be held to prevail over its obligation to defendant is where, unlike here, Liberty Mutual or defendant has done or failed to do some act from which it can be concluded that the obligation to plaintiff has acquired a superior equity. No decided case of which we are aware, except that of the majority's decision today, would predicate a similar result on any other basis.[1] The absence of estoppel or waiver

[1] The majority insists that today's decision does no violence to the policy considerations underlying Virginia's statute of limitations and cites in this connection *Brunswick Land Corp.* v. *Perkinson*, 153 Va. 603, 151 S. E. 138 (1930). Aside from some doubt concerning the authoritativeness of *Brunswick* in light of the fact that it was a trial court opinion adopted by the Virginia Supreme Court, and in light of more recent pronouncements by that Court upon the issue of exceptions to the statute of limitations—most notably *Jones* v. *Morris Plan Bank of Portsmouth*, 170 Va. 88, 195 S. E. 525 (1938)—it must be noted that Brunswick did no more than to acknowledge the generally recognized equitable estoppel exception to the defense of limitations. Yet the majority specifically disavows reliance upon the doctrine of equitable estoppel. In short, in spite of the fact that this is a diversity case, the majority can point to no colorable Virginia authority which suggests the result that the majority reaches today.

renders irrelevant the speculations of the majority as to why plaintiff may have concluded not to assert the existence of the fiduciary relationship when he learned of it in October, 1963; properly, knowledge of the mere existence of the relationship is without significance.[2]

The scope of the majority's decision is uncertain; its possible consequences are horrendous. Does the fact of a fiduciary relationship mean that as well as precluding the plea of limitations, defendant may not assert nonliability on the merits? The majority suggests not, but its *ipse dixit* that the defense of limitations may be distinguished is unsupported by authority or logic. No less convincing nor better supported is the distinction drawn between Liberty Mutual's right to plead limitations with regard to the portion of plaintiff's *ad damnum*, or recovery, which exceeds Schmutz's policy limits and that less than the policy limits. Liberty Mutual defends Schmutz under a covenant to defend which provides no basis for such fragmentation; Liberty Mutual is not a party defendant and its liability is strictly secondary. Thus, initial error is compounded by further error. Even with regard to the portion of plaintiff's alleged cause of action to which limitations may not be pleaded, one may wonder is Liberty Mutual precluded from contesting the extent of plaintiff's recovery even if it is allowed to contest liability?

These are not idle inquiries having relevance only to this particular case. In the field of maritime litigation it

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[2] Even if the reasons why Atkins has *never* alleged that Liberty was bound to him by a fiduciary relationship and has *never* complained of the dual aspect of Liberty's position were relevant, we note that the majority's speculations do not supply a satisfactory explanation. The majority theorizes that the issue was never raised by Atkins because he feared that to do so would antagonize Liberty and thereby place in jeopardy the medical attention which Atkins was receiving from Liberty. Yet the majority says that this attention ceased in March, 1967. The majority suggests no reason why the duality issue was not raised *after* this date, particularly if Liberty was attempting to bring unconscionable pressure to bear upon Atkins.

is not unusual for the same insurer to provide the workmen's compensation coverage for injured longshoremen and the liability coverage for their employer who is impleaded when a longshoreman sues the ship. *Ballwanz* v. *Jarka Corporation of Baltimore*, 382 F.2d 433 (4 Cir. 1967), is one example. With growing liberality in the obtention of verdicts over on the theory of breach of implied warranty of good workmanship, the realities of such litigation are that the insurer is in a position antagonistic to itself, as *Ballwanz* demonstrated. As every experienced admiralty trial judge has observed, the stevedore's insurance carrier's first ground of defense is the non-liability of the ship. Indeed, where the seaman's claim is that the unseaworthiness of the ship was the result of the negligent act of the stevedore's fellow-employee, the identity of interest is inevitable. In these and other cases, the active cooperation between counsel for the stevedore and the ship, heretofore not thought improper, legally or ethically, in establishing that defense is manifest. Until today no one dared suggest that Liberty Mutual on behalf of Jarka, or any carrier on behalf of its stevedore-insured, could not defend vigorously and successfully with regard to the entire claim. Their right to do so in the future is now in question.

In the field of motor vehicle tort liability, it is not unusual that defendant's insurer has also provided collision coverage to the plaintiff, or even that the same insurer insures both parties for public liability in a suit in which a counterclaim or cross-claim is asserted. How an insurer in such circumstances may avoid the dilemma the majority's decision poses, or how it should conduct itself with respect to the rights of its various insureds when it finds itself in this dilemma, is likewise highly problematical in the light of today's decision. Much more is at stake than the individual concern of the insurer. No feasible basis to provide reasonable protection to the insurer is apparent; the only assumable alternative is

greatly increased costs of providing insurance coverage with the resulting deleterious effect of discouraging the socially desirable result of ready and certain response to judgments for liability which insurance provides.

To paraphrase Mr. Justice Frankfurter in *Czaplicki* the disposition of a case is of prime importance to the parties, but how a result is reached concerns the rational development of the law. We deem today's decision irrational, and respectfully dissent.

HAYNSWORTH, Chief Judge, dissenting:

I associate myself without reservation with Judge Winter's dissenting opinion. It is not enough, as Judge Winter demonstrates, to point to the fact that there was a fiduciary relationship between Liberty Mutual and Atkins. To warrant judicial limitation upon Liberty Mutual's performance of its fiduciary obligations to Schmutz and its defense of its own financial interest as the liability insurer of Schmutz, it is essential that there appear some neglect of Liberty's fiduciary duty to Atkins or conduct which would create the basis of an estoppel. Had Liberty lulled Atkins into delay, beyond Kentucky's one-year statute of limitations, in filing his action in the Western District of Kentucky, there would be a basis for the remedy the majority evokes, but no such thing occurred. Liberty fully discharged its fiduciary obligations to Atkins. With respect to them, it has done all of those things it ought to have done; it has done none of those things it ought not to have done. To impose disabilities upon it under those circumstances, seems to me to be without foundation either in law or morality.

I think it most regrettable, however, that the resubmission of the case to the *en banc* court has resulted in

such a radical change in the dialogue and the production of a majority opinion with a high potential for untoward consequences upon liability insurers and their businesses and upon the effectiveness and cost of their contracts. Liability insurance has become a necessity for every business, which is not so large as to be able to afford the risk of self-insurance, and to every responsible individual. Limitations upon the effectievness of such protection and unreasonable inflation of its cost, for in the end it is the assureds, not the insurance companies, which must bear the financial burden, are matters of no small public concern.

The earlier dialogue in the original panel was more rational and more useful. See *Atkins* v. *Schmutz Manufacturing Company*, 4 Cir., 401 F.2d 731. It is quite possible, I think, to reach the result to which the majority comes on the ground that the question of the tolling of Virginia's statute of limitations is to be resolved as a matter of federal law. The federal courts provide a single unified system for the administration of justice, *see Internatio-Rotterdam, Inc.* v. *Thomsen*, 4 Cir., 218 F.2d 514, and, aside from matters of convenience and practicality, its subdivisions need not conform to state boundaries. Surely the question of the transferability of the first action from the Western District of Kentucky to the Western District of Virginia, more than two years after the injury, would have been determinable solely as a question of federal procedure. That provides a logical analogy to support the conclusion that the effect of the pendency of the first action in the Western District of Kentucky should be resolved as a matter of federal law when the filing of the first action met the fundamental purpose of Virginia's two-year statute of limitations foreclosing stale claims of longer duration and the second action was filed in the Western District of Virginia during the pendency of the first.

Guaranty Trust Company v. *York*, 326 U.S. 99, and *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530, are major obstacles in the way of that conclusion, of course, but if a majority of this court is not now prepared to join Judge Craven in the position he earlier took in dissent from the panel's decision,[1] expansion of that dialogue would at least have afforded the Supreme Court an opportunity for further consideration of the continuing vitality of *Guaranty Trust* and *Ragan* after *Byrd* v. *Blue Ridge Electric Cooperative*, 356 U.S. 525, and *Hanna* v. *Plumer*, 380 U.S. 460. Abandonment of that dialogue destroys an opportunity to achieve elucidation and a healthy evolution of the law in this area and substitutes a declaration, in a wholly unrelated area of the law, of a legal principle which has as its apparent[2] support only the wish to achieve a particular result in a particular case and which carries with it much potential mischief in litigation yet to come.

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[1] See 401 F.2d 734, et seq.

[2] I do not intimate that greater support for their conclusion is not apparent to my brothers of the majority than to me.

APPENDIX C

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11,566

DONALD L. ATKINS, *Appellant*,

versus

SCHMUTZ MANUFACTURING COMPANY, INCORPORATED, *Appellee.*

Appeal from the United States District Court for the Western District of Virginia, at Danville.
Ted Dalton, Chief Judge.

(Argued Jan. 12, 1968. Decided Sept. 10, 1968.)

Before WINTER and CRAVEN, Circuit Judges, and KELLAM, District Judge.

James A. Eichner (George E. Allen, Jr., and Allen, Allen, Allen & Allen on brief) for Appellant, and Frank O. Meade (Meade, Tate and Meade on brief) for Appellee.

WINTER, Circuit Judge:

Plaintiff appeals from a summary judgment entered for defendant on the ground that plaintiff's action was barred by the Virginia statute of limitations. In the limited role that we occupy in the exercise of diversity

jurisdiction, we are constrained to agree, and we affirm the judgment.

Plaintiff was injured on June 22, 1961, at South Boston, Virginia, when he became entangled in a machine manufactured and sold by the defendant. His injury necessitated amputation of both of his feet and he spent a long period of time in various hospitals and rehabilitation centers. Because he believed that the defendant was negligent in the design and construction of the machine which so severely and permanently injured him, he concluded to pursue his rights against the defendant.

The defendant's only place of business was and is in Louisville, Kentucky. Virginia had no "long-arm statute" until 1964.[1] Thus, plaintiff, at the time he initially sought to institute suit, reasonably concluded that the defendant could not be sued in Virginia. Suit was brought in the United States District Court for the Western District of Kentucky on June 19, 1963. The suit in Kentucky was brought more than one year, but three days less than two years, after the date of injury. The Virginia statute applicable to the plaintiff's alleged cause of action prescribes two years as the period of limitations, 2 Code of Virginia (1957 Repl. Vol.) § 8-24; the comparable period under Kentucky law is one year, K.R.S. § 413-140.

At the time plaintiff brought suit in Kentucky, Kentucky decisions were understood in the federal courts to hold that in a suit filed in Kentucky, based upon a cause of action arising in another state, "the statute of limitations of another state, if longer, is applicable." *Collins* v. *Clayton & Lambert Manufacturing Co.*, 299 F.2d 362, 364 (6 Cir. 1962); *Koeppe* v. *Great Atlantic & Pacific Tea Co.*, 250 F.2d 270 (6 Cir. 1957); *Burton* v. *Miller*, 185 F.2d 817 (6 Cir. 1950). However, while plaintiff's suit was pending in the Kentucky district court, the

[1] Such a statute is now in effect. 2 Code of Virginia (1966 Cum. Supp.) § 8-81.2.

Kentucky Court of Appeals held that in such cases the Kentucky one-year statute of limitations would prevail over a longer period of another state. *Seat* v. *Eastern Greyhound Lines, Inc.*, —— Ky. ——; 389 S.W.2d 908 (1965). And it also decided that this rule should be applied retrospectively. *Wethington* v. *Griggs*, —— Ky. ——, 392 S.W.2d 56 (1965).

Thereafter, defendant filed a motion for summary judgment on the ground that suit was barred in Kentucky. The motion was granted by the district court and affirmed on appeal. *Atkins* v. *Schmutz Mfg. Co.*, 372 F.2d 762 (6 Cir. 1967). Certiorari to the Supreme Court has been denied. *Atkins* v. *Schmutz Manufacturing Co., Inc.*, 389 U.S. 829 (1967).

The instant case was filed in the United States District Court for the Western District of Virginia, on March 13, 1967, almost six years after the injury occurred, but before the mandate of the United States Court of Appeals for the Sixth Circuit had issued. By motion for summary judgment, defendant asserted that the Virginia two-year statute of limitations barred plaintiff's suit. Finding that plaintiff could not fit himself into any of the instances in which Virginia suspends the running of the statute, the district judge granted the motion. We agree that plaintiff may not maintain the action.

Virginia suspends the running of the statute for varying periods when the plaintiff is under the disability of infancy or insanity, when the plaintiff has died, when there is delayed qualification of plaintiff's personal representative and when suit is prevented by the defendant. 2 Code of Virginia (1957 Repl. Vol.) §§ 8-30; 8-31; 8-32; 8-33. None of these instances of suspension is applicable. Section 8-34 is the only remaining suspension statute, and its text is set forth in the margin.[2]

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[2] "§ 8-34. Further time given when suit abates or is defeated on ground not affecting the right to recover.—If an action or suit

Section 8-34 (known as § 5826 in the Code of 1919) was judicially construed in *Jones* v. *Morris Plan Bank of Portsmouth*, 170 Va. 88, 195 S. E. 525 (1938). There, the plaintiff to avoid the bar of limitations argued that there should be excluded from the limitation period the fourteen months during which there was pending in the Circuit Court of the City of Suffolk a suit by him against the same defendants for the same alleged cause of action for malicious abuse of civil process which had been finally dismissed for lack of venue properly pleaded. In rejecting the contention, the Supreme Court of Appeals said this about the statute:

> "An analysis of our statute (section 5826) shows that in only four instances is there a suspension of the statute of limitations by reason of the pendency of a former suit brought in due time. These are: (1) Where such suit abates 'by the return of no inhabitant,' that is, where the writ is not served for that reason; (2) where the suit abates by reason of the 'death or marriage' of a party; (3) where, after the plaintiff has obtained a judgment or decree in his favor, it is 'arrested or reversed upon a ground which does not preclude a new action or suit for the same cause'; and (4) where 'there be occasion to bring a new action or suit by reason of the loss or destruction of any of the papers or records in a former suit or action which was in due time.'

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commenced within due time in the name of or against one or more plaintiffs or defendants abate as to one of them by the return of no inhabitant or by his or her death or marriage, or if in an action or suit commenced within due time judgment or decree for the plaintiff shall be arrested or reversed upon a ground which does not preclude a new action or suit for the same cause, or if there be occasion to bring a new action or suit by reason of the loss or destruction of any of the papers or records in a former suit or action which was in due time; in every such case, notwithstanding the expiration of the time within which a new action or suit must otherwise have been brought, the same may be brought within one year after such abatement, or such arrest, or reversal of judgment or decree, or such loss or destruction, but not after."

> None of these provisions applies to the plaintiff's case. There is no saving provision where a suit, such as that of the plaintiff here, was brought in the wrong forum or was dismissed otherwise than upon the merits." 195 S.E. 526-527.

See also *Manuel* v. *Norfolk & Western Ry. Co.*, 99 Va. 188, 37 S.E. 957 (1901).

As significant as the holding and what was said was the approach of the Court in that case. The Court treated as absolute the bar contained in § 8-24 unless and until plaintiff could bring himself specifically into one of the instances of suspension of the bar elsewhere provided in the statute. In that case, the plaintiff could not, any more than can the plaintiff in the instant case, and hence his suit was held barred. In this connection, the Court in the *Morris Plan Bank* case deemed significant, as do we, that when a suit is for wrongful death (as distinguished from personal injuries), Virginia law suspends the period of limitations during the pendency of any action subsequently abated or dismissed without a determination of its merits. 2 Code of Virginia (1957 Repl. Vol.) § 8-634. The presence of this provision in suits for wrongful death makes its absence in suits for personal injuries strong evidence that Virginia would not permit suspension of the limitation period in the instant case.[3]

Citing *Burnett* v. *New York Cent. R. Co.*, 380 U.S. 424 (1965), plaintiff argues that pendency of the action in Kentucky tolled the Virginia statute.[4] *Burnett* held that a

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[3] The parties call to our attention House Bill 744, introduced into the 1966 session of the Virginia General Assembly, which would have tolled the statute for action timely instituted "within or without the State", but "dismissed otherwise than upon the merits of the cause of action." The bill passed the House, but died in the Senate Committee. Because of the paucity of legislative materials we cannot determine if the bill was permitted to die because it was thought unnecessary, or because it was thought undesirable. If for no other reason, the history of the bill is thus of minimal aid.

[4] The Kentucky suit was filed three days before the expiration of two years from the date of the accident. The Virginia suit was

timely state action under the Federal Employers' Liability Act dismissed for lack of proper venue tolled the Act's three-year period limitations until the state court order dismissing the action became final by expiration of the time for appeal or the entry of final judgment on appeal; hence, a federal suit, filed eight days after dismissal of the state action, was not barred. Although the *Burnett* case concerned limitations under the Act and presented a question different from that presented here, plaintiff stresses its broad statements that statutes of limitations are intended to promote justice by preventing the revival of claims which have been allowed to slumber until evidence has been lost, and that the policy of repose is frequently outweighed where the interests of justice require vindication of a plaintiff's rights. The *Burnett* case did contain such language and we are in full accord with it. Indeed, we are in full accord with the observations of the Sixth Circuit that the equities of this case "strongly favor appellant" (372 F.2d 764) and of the district judge below that the argument that plaintiff should prevail on the point in issue "is appealing to this court." In the instant case, the pendency of the Kentucky litigation would certainly satisfy any legislative purpose to guard against slumbering claims and would have provided ample opportunity for discovery and preservation of relevant evidence.

But the short answer is that we do not have before us a federal statute of limitations on which we are free to apply the holding or the rationale of the *Burnett* decision. We have a state statute to which we must apply state decisional law to the end that "the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 109 (1945); *Erie R. Co.* v. *Tomp-*

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filed within three days after the issuance of the mandate by the United States Court of Appeals for the Sixth Circuit.

kins, 304 U. S. 64 (1938).[5] We cannot read the Virginia statutes or the *Morris Plan Bank* case as permitting plaintiff an opportunity to show if his claim of negligence on the part of defendent is meritorious.

We find no merit in plaintiff's argument that we are free to reexamine § 8-34 under federal law because this case presents a federal question—whether plaintiff has been denied due process of law because of the deprivation of a trial on the merits. If plaintiff has been denied due process of law, that deprivation occurred when the Kentucky district court under the *Erie* doctrine applied Kentucky's retroactive state construction of state law. Although not explicitly, that issue was decided implicitly against plaintiff in his appeal to the Sixth Circuit. We would be unwarranted in entertaining a collateral attack on the judgment of the Sixth Circuit.

AFFIRMED.

CRAVEN, Circuit Judge, dissenting:

I regret that I am unable to persuade the court that we may faithfully follow the *Erie-Guaranty-Byrd-Hanna*[1] doctrine without necessarily denying this plaintiff a trial on the merits. If we were deciding this case after *Erie* and *Guaranty* but before *Byrd* and *Hanna*, I would agree, albeit reluctantly, that the result is compelled. It would be difficult, indeed, to distinguish *Guaranty*, involving as it did a state statute of limitations, without the light

[5] It should be noted that the *Guaranty Trust* case decided that the now familiar *Erie* rule was applicable to state statutes of limitations in diversity cases.

[1] *Erie* v. *Tompkins*, 304 U.S. 64 (1938); *Guaranty Trust Co. of N.Y.* v. *York*, 326 U.S. 99 (1945); *Byrd* v. *Blue Ridge Elec. Cooperative*, 356 U.S. 525 (1958); *Hanna* v. *Plumer*, 380 U.S. 460 (1965). Hereafter, these state-law-in-the-federal-courts cases will be referred to simply as *Erie*, except as indicated.

shed by *Byrd* and *Hanna*. The simplistic test of *Erie* (substance-procedure) and the mechanistic test of *Guaranty* (outcome) have undoubtedly survived *Byrd* and *Hanna*, but have been so altered that Mr. Justice Harlan, concurring in *Hanna*, concludes that the Supreme Court has "not succeeded in articulating a workable doctrine governing choice of law in diversity actions." More specifically with respect to the problem before us—the application of a state statute of limitations—Professor Charles Alan Wright concluded, even before *Hanna*, that under the Constitution (1) only the state can say what local tort duties are to be imposed within the state; (2) that only the federal government can say how the federal courts are to administer their proceedings; and (3) that it is a difficult and doubtful question whether state or federal law should control how promptly a suit must be brought in a federal court to vindicate a state-created right.[2] What seemed so clear after *Guaranty*[3]—that a federal court must mechanistically apply a state statute of limitations—is now, as Professor Wright suggests, in the shadow zone. If there is room for doubt that the federal court must apply the Virginia state statute of limitations, it would seem to me an a fortiori proposition that there ought to be considerable doubt about the very narrow issue before us: whether, assuming the application of the two-year Virginia statute of limitations, it may have been tolled by the commencement of the Kentucky diversity action. Finally, if I am wrong on both counts, and it be assumed that we must not only apply the two-year Virginia statute but also apply the law of Virginia with

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[2] Wright, Federal Courts § 56 at 198. Professor Wright assumes that *Erie* rests on its avowed constitutional basis despite much commentary to the contrary. *See id.* § 56.

[3] The mechanical test of *Guaranty* (from which the Court sharply retreated in *Hanna*) may be partially explained by the author's aversion to diversity jurisdiction. See Mr. Justice Frankfurter's dissent in *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943), where he said, "I speak as one who has long favored the entire abolition of diversity jurisdiction." *Id.* at 337.

respect to the tolling of it, I am strongly of the opinion that we need not assume the rule of ventriloquist's dummy[4] but are, instead, free to function as Virginia state judges would when faced with a fact situation not previously considered by Virginia's highest court.

Although I think the question is not free of doubt, I am willing to assume for purposes of this decision that *Guaranty Trust* forecloses consideration by an inferior federal court of the possibility that a statute of limitations not bound up with the creation of the cause of action is "procedural" rather than "substantive" and thus clearly outside the *Erie* rule as originally promulgated in *Erie* itself.[5]

To go so far, and no further, will, in my opinion, serve federalism better than will a mechanistic resort to Virginia tolling statutes and imprecise Virginia state court decisions interpreting them. "The purpose of the Erie doctrine, even as extended by York and Ragan, was never to bottle up federal courts with 'outcome-determinative' and 'integral-relations' stoppers—when there are affirmative countervailing [federal] considerations . . . ." *Hanna* v. *Plumer*, 380 U.S. 460, 473 (1965) (brackets in original).

It is important to remember how this particular plaintiff became enmeshed in this particular procedural booby trap. He is a *Virginia* resident who reasonably thought he could not bring his suit in Virginia because it lacked a long-arm statute and was thus driven out of his own

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[4] *Fidelity Union Trust Co.* v. *Field*, 311 U.S. 169 (1940), is the high water mark of ritualistic application of state law in a federal court. Before the water began to noticeably recede, Judge Jerome Frank expressed his dismay in this colorful phrase. *Richardson* v. *CIR*, 126 F.2d 562, 567 (2d Cir. 1942). Annot., 140 ALR 705 (19—).

[5] It has often been suggested that Congress possess the power to enact a general statute of limitations governing diversity cases. *E.g.*, Friendly, *In Praise of Erie—And of the New England Common Law*, 39 N.Y.U.L. Rev. 383, 402 n. 90 (1964).

state to litigate. Even so, he brought it within the two-year period allowed by his state of residence and the place of the tort, *i.e.*, Virginia. He reasonably relied on Kentucky decisions as interpreted in United States courts that Kentucky would permit the maintenance of the suit if brought within the period of limitation of the place of the tort. Pendente lite the decisional law of Kentucky is changed retrospectively so as to make applicable to his case the shorter one-year statute of limitation of Kentucky.[6]

The majority decision rests heavily upon the premise that the "outcome" must be the same in the federal court as it would have been in the state court, citing *Guaranty*. For reasons developed later. I am not sure what the outcome would have been in a Virginia court. But presently assuming that Atkins would have been barred in the state court, I think it fairly demonstrable that the opposite result—trial on the merits—could have been obtained in a federal court unhampered by either *Erie* or *Guaranty*. If this is so, then the problem becomes a purely procedural one involving the method of operation of the federal courts. In at least two ways Atkins might have avoided the *Erie* problem.

When the Kentucky Supreme Court switched its interpretation of the period of limitation, Atkins could then have sought a transfer of the proceedings to Virginia under § 1406(a) of the Judicial Code. Section 1406(a) provides:

> "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice,

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[6] The issue on this appeal is completely different from the issue before the Sixth Circuit in the original *Schmutz* action. The original action was controlled entirely by *Klaxon Co.* v. *Stentor Mfg. Co.*, 313 U.S. 487 (1941), which holds foursquare that a federal court in a diversity action must apply the forum state's conflict of laws rule.

> transfer such case to any district or division in which it could have been brought."

A district is "wrong" within the meaning of § 1406 whenever there exists an obstacle to an expeditious and orderly adjudication on the merits.[7] Thus where the obstacles to reaching the merits in the original district were both improper venue and a lack of personal jurisdiction over the defendant, the Supreme Court of the United States has approved a transfer of the proceedings to another district, rather than permit a dismissal to result in having the statute of limitations bar a new proceeding in another district. *Goldlawr* v. *Heiman*, 369 U.S. 463 (1962).

But obstacles other than improper venue or lack of personal jurisdiction have been held to warrant a transfer under § 1406. Thus a libellant who filed a libel in the Southern District of New York, thinking he could find a vessel there, was permitted to transfer the proceeding to the Maryland district where the vessel was, thereby avoiding a dismissal in New York and the bar of the statute of limitations that would have confronted a new proceeding in Maryland. *Internatio-Rotterdam, Inc.* v. *Thomsen*, 218 F.2d 514 (4th Cir. 1955). In ordering the Maryland district court to accept the transfer from the New York district, the late Judge John Parker of this court added:

> "Certainly such transfer is in accord with the modern standards of procedure, the purpose of which is to get away from time-consuming and justice-defeating technicalities and secure an adjudication of the rights of the parties by as direct and expeditious a route as possible. The courts of the United States

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[7] "The statute does not refer to 'wrong' venue, but rather to venue laid in a 'wrong division or district.' We conclude that a district is 'wrong' within the meaning of § 1406 whenever there exists an 'obstacle [to] . . . an expeditious and orderly adjudication' on the merits." *Dublin* v. *United States*, 380 F.2d 813, 815 (5th Cir. 1967). *Accord, Mayo Clinic* v. *Kaiser*, 383 F.2d 653 (8th Cir. 1967).

> comprise one great system for the administration of justice . . . [There is no reason why the proceedings should not have been transferred instead of being dismissed, with the necessity of starting all over again,] where, as here, the new proceeding would be barred by the statute of limitations." *Internatio-Rotterdam, Inc.* v. *Thomsen*, 218 F.2d 514, 517 (4th Cir. 1955).

Had the Atkins' Kentucky proceeding been transferred to the Western District of Virginia while the present action was awaiting trial there, the two proceedings could have been consolidated and tried there as one case. *See Abbott Laboratories* v. *Gardner*, 387 U.S. 136 at 154-155 (1967).

The obstacle to an orderly and expeditious adjudication on the merits of Atkins' claim in Kentucky was the novel and unanticipated application of that state's one-year statute of limitation. When Atkins commenced the Kentucky action the existing decisions caused him justifiably to believe he could rely on the longer Virginia provision.[8] What made the Kentucky district "wrong" as a place to reach the merits of Atkins' claim was the unexpected obstacle created by the changed rulings of the Kentucky state courts after his action was commenced.

After the Supreme Court of the United States denied certiorari to the Court of Appeals for the Sixth Circuit, *Atkins* v. *Schmutz Mfg. Co., Inc.*, 389 U.S. 829 (1967), it was finally settled that the one-year Kentucky statute of limitation was an insurmountable obstacle to reaching the merits of Atkins' claim in the Kentucky district.[9] Atkins was then in a "wrong" district within the meaning of § 1406 and a transfer of the action to the Western

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[8] For a discussion of Kentucky law as it was understood in the federal courts when Atkins commenced his action in Kentucky, see *Atkins* v. *Schmutz Mfg. Co., Inc.*, 372 F.2d 762, 763 (6th Cir. 1967).

[9] There is no suggestion that the judgment of the Kentucky district court adjudicates the merits of Atkins' complaint.

District of Virginia would have preserved the tolling effect on the Virginia statute that began with the commencement of the federal court action in Kentucky. By commencing this action within two years of his injury, Atkins had shown that diligence required by the Virginia statute and the delays that resulted thereafter came out of moves by the defendant to avoid trial of Atkins' claim on the merits.

That Atkins' situation at this point came within the protection of § 1406 seems transparently clear from what the Supreme Court of the United States has said of that section:

> "The problem which gave rise to the enactment of the section was that of avoiding the injustice which had often resulted to plaintiffs from dismissal of their actions merely because they had made an erroneous guess with regard to the existence of some elusive fact of the kind upon which venue provisions often turn. Indeed, this case it itself a typical example of the problem sought to be avoided, for dismissal here would have resulted in plaintiff's losing a substantial part of its cause of action under the statute of limitations merely because it made a mistake in thinking that the respondent corporations could be 'found' or that they 'transact . . . business' in the Eastern District of Pennsylvania. The language and history of § 1406(a), both as originally enacted and as amended in 1949, shows a congressional purpose to provide as effective a remedy as possible to avoid precisely this sort of injustice.
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> "The language of § 1406(a) is amply broad enough to authorize the transfer of cases, however wrong the plaintiff may have been in filing his case as to venue, whether the court in which it was filed had personal jurisdiction over the defendant or not. The section is thus in accord with the general purpose which has prompted many of the procedural changes of the past few years—*that of removing whatever obstacles may impede an expeditious and orderly ad-*

> *judication of cases and controversies on their merits.* When a lawsuit is filed, that filing shows a desire on the part of the plaintiff to begin his case and thereby toll whatever statutes would otherwise apply. The filing itself shows the proper diligence on the part of the plaintiff which such statutes of limitation were intended to insure. If by reason of the uncertainties of proper venue a mistake is made, Congress, by the enactment of § 1406(a), recognized that the 'interest of justice' may require that the complaint not be dismissed but rather that it be transferred in order that the plaintiff not be penalized by what the late Judge Parker aptly characterized as 'time-consuming and justice-defeating technicalities.' It would at least partially frustrate this enlightened congressional objective to import ambiguities into § 1406(a) which do not exist in the language Congress used to achieve the procedural reform it desired." *Goldlawr* v. *Heiman*, 369 U.S. 463, 466-467 (1962). (Emphasis added.)

The *Goldlawr* language just quoted also strongly suggests that the commencement of the Kentucky proceedings tolled "whatever statutes of limitation would otherwise apply." In Atkins' case this could only refer to the two-year Virginia statute of limitations since the one-year Kentucky statute had already run when the Kentucky proceeding commenced. Indeed it was the application of the Kentucky statute which deprived Atkins of a remedy in that state and brought his claim within the protective policy of § 1406. It has been held, where lack of personal jurisdiction in the transferor district provided the basis for a venue transfer under § 1406, that the statute of limitation of the transferor state transferred with the action. *Mayo Clinic* v. *Kaiser*, 383 F.2d 653 (8th Cir. 1967). Whatever may be the applicable rule where the obstacle to reaching the merits is either defective venue or personal jurisdiction,[10] it would both defeat the general

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[10] In *Van Dusen* v. *Barrack*, 376 U.S. 612 (1964), it was held that the law of the transferor district followed a case transferred on

protective policy of § 1406 and the particular justification for a venue transfer if the statute of limitations of Kentucky were to follow a transfer of Atkins' action to Virginia.

Thus, as I see the matter, the commencement of Atkins' action in Kentucky tolled the running of the Virginia statute of limitations. When it became clear he was barred from a remedy in Kentucky, he could have transferred the action to the Virginia district court under § 1406 and have proceeded to the merits of his claims without having the Virginia statute of limitations bar his claim. Moreover, the Virginia district by this time was one in which the case "could have been brought" within the meaning of § 1406 since the Virginia long-arm statute

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motion of the *defendant* under § 1404(a). The Court reserved the question whether a § 1404(a) transfer sought by the plaintiff would be governed by the same rule, *id.*, at 639-640, and there seem to be good reasons for not taking along the law of the transferor district where the plaintiff seeks a transfer from a district "wrong" under § 1406.

In *Les Schwimley Motors, Inc.* v. *Chrysler Motors Corp.*, 270 F. Supp. 418, Judge Halbert expressed the viewpoint that transferring a diversity case to a district in another state, on motion of the plaintiff, does not necessarily carry with it the statute of limitations of the state in which the suit was commenced, citing the proposal of the American Law Institute in its Study of the Division of Jurisdiction Between State and Federal Courts. Judge Halbert finds himself in accord with the viewpoint of the late Professor Brainerd Currie as indicated in the following quotation from the opinion of the district court:

> "Viewing the federal courts as independent forums for the invocation of legal rights created by state law, the essence of the decision in Erie R. Co. v. Tompkins, supra, militates against the unthinking adoption of one forum's statute of limitations in a case which no longer has any substantial connection with that forum. If such a course does not violate the due process clause (See: Home Insurance Co. v. Dick, 281 U.S. 397, 50 S.Ct. 338, 74 L.Ed. 926) it certainly violates the sense of 'juster justice' that hopefully prevails in the federal system (See: Hart and Wechsler, The Federal Courts and the Federal System (1953) at pp. 652, 892-900; Hart, The Relations between State and Federal Law, 54 Column.L.Rev. 489)." *Id.* at 420-421.

had been enacted in 1964, long before the Supreme Court of the United States denied certiorari to the Court of Appeals for the Sixth Circuit.

I concede, of course, that the path to a trial on the merits envisioned above is not a broad, inviting one. I suggest only that it may have been negotiable. But there is another and easier way that Atkins might have obtained a trial on the merits.

Despite the lack of a Virginia long-arm statute at the time, Atkins could have originally filed suit in the district court in Virginia. When the defendant predictably moved to dismiss for lack of jurisdiction, Atkins could have sought a transfer of venue under 28 U.S.C. § 1406 and would have brought himself squarely within *Goldlawr* v. *Heiman, supra.* Pursuant to *Goldlawr*, presumably the district judge in Virginia would have transferred the case to the District Court of Kentucky and under the doctrine of *Mayo Clinic* v. *Kaiser*, 383 F.2d 653 (8th Cir. 1967), the Virginia statute of limitations would have "followed" the case to the District Court of Kentucky and the shorter Kentucky statute of limitations would have had no effect.[11]

Thus it seems that there are at least two ways by which specialists in federal jurisdiction, if there are any outside of the faculties of law schools, might have been able to obtain for the plaintiff a trial on the merits in a federal court. If this be so, the outcome-determinative test of *Guaranty* is not invoked, or if invoked, is simply avoided by the method of operation of the federal courts which is surely not a matter of state regulation. Summarizing, it is apparent that the *Erie* decision alone does not require the court's result. "In view of Brandeis' careful limitation of his statement of unconstitutionality to 'substantive rules of common law,' it is strange that *Erie* has

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[11] See note 10 *supra; accord, Headrick* v. *Atchison Topeka and Santa Fe Ry. Co.*, 182 F.2d 305 (10th Cir. 1950).

sometimes been claimed to have handcuffed federal procedure to that of the state where the court sits—although in this instance most critics have had the grace to admit that their fears spring not from *Erie* itself but from some overly enthusiastic expressions in *Guaranty Trust Co.* v. *York* . . . ." [12] Whether the conduct of the plaintiff in instituting suit in Kentucky amounts to a tolling of the statute certainly relates as much to "procedure" as it does to "substance." For conflicts of law purposes, questions of application of statutes of limitations have traditionally been classified with procedure. The conflicts of laws rule in most jurisdictions is that *lex fori* controls. *Michigan Insurance Bank* v. *Eldred*, 130 U.S. 693 (1889); *McElnoyle* v. *Cohen*, 38 U.S. 311 (1839); Goodrich, Conflict of Laws § 85 (4th ed. 1964). In *Guaranty Trust*, *supra*, the Supreme Court declined to categorize statutes of limitations as either "substantive" or "procedural" for *Erie* purposes.

Similarly, the "outcome-determinative test" of *Guaranty* is not violated for the result of trial on the merits would have occurred in the state court of Virginia had it been possible at the time for Virginia process to run outside the state.[13] "Forum shopping" within the State of Virginia is not involved for presumably the plaintiff would have been well content in a Virginia state court if its process could have reached to Kentucky.[14] Finally, since *Byrd*, it is not at all clear that the substantive right in tort is in this case "bound up" either with the statute of limitations or with the question of the tolling of that statute, for this statute of limitations is simply a general one and not a condition precedent to the exercise of

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[12] H. Friendly, Benchmarks 175 (1967). (Footnotes omitted.)

[13] Whether "outcome" would have been different if the *present* action had been begun in the Virginia State court is discussed below.

[14] Whether forum shopping was involved in starting the present action in a federal court in Virginia is also discussed below.

a special right created by statute, *e.g.*, wrongful death. The statute in this case is not prescriptive and the running of the period does not destroy the underlying right. *See* Comment, *Developments—Statute of Limitations*, 63 Harv. L. Rev. 1177, 1186 (1950); *Page* v. *Cameron Iron Works*, 155 F.Supp. 283, 286 (S.D. Texas 1957).

Mr. Justice Harlan, concurring in *Hanna*, gave us good advice when he said, "To my mind the proper line of approach in determining whether to apply a state or federal rule, whether 'substantive' or 'procedural' is to stay close to basic principles by inquiring if the choice of rule would substantially affect those primary decisions respecting human conduct which our constitutional system leaves for state regulation." The primary decision here was whether to sue the defendant. That decision remains governed by state regulation creating a tort action against the defendant. Application of Mr. Justice Harlan's test plainly leaves us free to permit this plaintiff a trial on the merits. Doing so will divert no stream of cases into the federal courts in Virginia or elsewhere. Doing so does not dishonor the Virginia statute of limitations for the reason that the action was commenced in Kentucky within the Virginia two-year period. To now permit this plaintiff a trial on the merits is not in derogation of Virginia policy but is plainly in accord with it. The enactment of the Virginia long-arm statute is a plain enunciation of a policy that its citizens be accorded the right of a trial on the merits against out-of-state tortfeasors.

The court recognizes that the state policy embodied in § 8-24 (the two-year statute of limitations) was effectuated by the filing of the Kentucky diversity action. The docket entries (reproduced in appellant's Appendix) in the Kentucky district court indicate that extensive discovery was taken. For some months the plaintiff was a patient in an institution maintained by the defendant's insurer for hospitalization and treatment. Thus it is clear that the policy embodied in § 8-24, as interpreted by the

Virginia Supreme Court of Appeals, has been served. *See Hawks* v. *Dehart*, 206 Va. 810, 813, 146 S.E. 2d 187 (1966). There is no danger here of the assertion of a fraudulent and stale claim to the surprise of the defendant after evidence may have been lost and the facts may have become obscure or after witnesses have died or disappeared.

Despite the warning in *Hanna*,[15] the majority feels duty bound by *Guaranty* ritualistically to apply *Jones* v. *Morris Plan Bank of Portsmouth*, 170 Va. 99, 195 S.E. 525 (1938). As they read it as foreclosing a federal district court sitting in Virginia from holding that the filing of the diversity action in Kentucky tolled the running of the Virginia statute of limitations. All that *Jones* holds, as I read it, is that the statute of limitations of Virginia was not tolled by the commencing of an action in the *wrong* state forum. Atkins did not file his suit in the *wrong* forum. It was the right forum and, indeed, the only forum, for the reason that he could obtain service of process nowhere else. Nor do I read the *Jones* decision as a statement or an analysis of state policy. It is simply an interpretation of the statute on the familiar premise of statutory construction that the enumeration of some things implies the exclusion of others. Unlike the majority, I am not at all certain that the Supreme Court of Appeals of Virginia would now hold, on the peculiar facts of our case, that Atkins has not successfully tolled the statute of limitations. Whether I am right about that or not, I am quite certain that neither the *Jones* case nor §§ 8-24 and 8-34 enunciates a state policy that a Virginia resident who is injured in Virginia shall not be entitled to a trial on the merits against a non-resident tortfeasor. There is no such Virginia interest and Virginia has, in my opinion, expressed no such policy either by statute or by decision of its highest court. *Byrd* teaches that when

[15] "[O]utcome determination analysis was never intended to serve as a talisman." 380 U.S. at 466.

there is no strong state interest in one result but there is a strong federal interest in the opposite result, the federal interest prevails. It seems to me, a fortiori, that where there is a strong state policy (as indicated by the state created tort action and the recent Virginia long-arm statute) and a strong federal policy both of which favor trial on the merits, it does not serve federalism mechanically to apply a readily distinguishable state decision that may be read, but does not have to be read, to require the opposite result.

Jones is distinguishable on yet another ground. In *Jones*, the plaintiff began a second action *after* the dismissal of a prior, timely proceeding and sought to exclude from the statutory period the time during which the earlier action was pending. The Supreme Court of Appeals of Virginia held that this period could not be excluded and barred the later-commenced action. It is clear, however, that a timely commenced action tolls the running of the Virginia statute of limitations. *Jones, supra.* Atkins, in fact, commenced the present Virginia action while the Kentucky proceedings were still pending and during the period in which those proceedings continued to toll the running of the Virginia statute. For this reason alone the Virginia proceeding may be regarded as timely commenced, and I do not think it unreasonable to suppose that the Supreme Court of Appeals of Virginia would reach this conclusuion.

I concede that if the position I hold had been known in advance as the rule of the Fourth Circuit, Atkins would undoubtedly have been influenced to choose a federal forum. But it did not happen that way. Atkins chose the federal forum certainly without knowing what the federal court would do,[16] and I suggest, without knowing how the state courts would view his problem. And it is not impossible he was influenced by other factors—including the possibility that if he began in the state court the de-

[16] His fears, not his hopes, are now realized.

fendant would remove to the federal court.[17] Plainly one of the twin aims of *Erie*[18]—to discourage forum shopping—is simply not involved here. Moreover, the precise problem confronting us will not likely arise again because of the new Virginia long-arm statute. Thus, even if we forecast badly how Virginia's highest court might view this tolling problem, no great injury will have been done to federalism.

What of the other twin aim of *Erie:* "avoidance of inequitable administration of the laws?" In *Szantay* v. *Beech Aircraft Corp.*, 349 F.2d 60 (1965), Judge Sobeloff clearly perceived the impact of *Byrd* and *Hanna* on *Guaranty.* In a helpful analysis of the modern *Erie* rule, he concluded:

> "If the state procedural provision is not intimately bound up with the right being enforced but its application would substantially affect the outcome of the litigation, the federal diversity court must still apply it unless there are affirmative countervailing federal considerations. This is not deemed a constitutional requirement but one dictated by comity
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> . . . .
>
> "At the heart of Erie was the intention to prevent different legal treatment of parties merely because of a variation in the residence of their opponent." 349 F.2d at 64.

The perceived evil of *Swift* v. *Tyson* was discrimination against residents in favor of non-residents. The same evil is present in the majority result. The non-resident citizen of Kentucky committing a tort within Virginia is

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[17] *See Hanna* v. *Plumer*, 380 U.S. 460, 475 (1965) (Harlan, J., concurring).

[18] In *Hanna*, the Supreme Court said: "The outcome determination test (of Guaranty Trust) therefore cannot be read without reference to the twin aims of the Erie rule: discouragement of forum shopping and avoidance of inequitable administration of the laws." 380 U.S. at 468.

afforded the benefit of a shorter statute of limitations than permitted a citizen of Virginia. Thus the spirit of *Erie* and the cause of federalism would be advanced by ignoring the Kentucky short statute of limitations which becomes operative by the pure accident of defendant's residence in Kentucky and the lack of a long-arm statute in Virginia. The second of the twin aims of *Erie*, "avoidance of inequitable administration of the laws," would be served by permitting this plaintiff a trial on the merits.

If we remember that we *are* applying the Virginia statute of limitations and that the question confronting us is simply whether, on the facts of this case, it has been tolled by the commencement of an action within its two-year period, the problem will yield, in my opinion, to the application of well recognized federal equitable principles. There is ample authority that the equitable remedies doctrine survived *Erie*.[19] Indeed, even in *Guaranty Trust Co.* v. *York*, it was said by Mr. Justice Frankfurter that: "[the decision] does not mean . . . that a federal court may not afford an equitable remedy not available in a state court." 326 U.S. at 105. "State law cannot define the remedies which a federal court must give simply because a federal court in diversity jurisdiction is available as an alternative tribunal to the State's courts. Contrawise, a federal court may afford an equitable remedy for a substantive right recognized by a State even though a State Court cannot give it." *Id.* at 106.

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[19] *Sprague* v. *Ticonic Bank*, 307 U.S. 161, 164 (1939); *General Electric Co.* v. *American Wholesale Co.*, 235 F.2d 606, 608 (7th Cir. 1956); *Anheuser-Bush* v. *Du Bois Brewing Co.*, 175 F.2d 370, 373 (3rd Cir. 1949); *Purcell* v. *Summers*, 145 F.2d 979, 990 (4th Cir. 1944); *Martin* v. *Reynolds Metals Co.*, 224 F. Supp. 978, 982 (D. Ore. 1963), *aff'd* 337 F.2d 780 (9th Cir. 1964); *Hertzbergs, Inc.* v. *Ocean Acc. & Guar. Corp.* 42 F. Supp. 52 (D. Neb. 1941), *aff'd* 135 F.2d 438 (8th Cir. 1943); *Wall & Beaver Street Corp.* v. *Munson Line*, 58 F. Supp. 101 (D. Md. 1943). *See Black & Yates Mahogany Ass'n*, 129 F.2d 227, 233 (3rd Cir. 1942), *cert. denied*, 317 U.S. 672 (1942), and cases there cited.

It is clear that in the federal courts the equitable doctrine of tolling is favored. *Honda* v. *Clark*, 386 U.S. 484 (1967). And it is equally clear, I think, that there is emerging a clearly expressed federal interest in the disposition of litigation on the merits. As Mr. Justice Black said in *Surowitz* v. *Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966), "If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits."

In *Burnett* v. *New York Central R.R. Co.*, 380 U.S. 424, 426-27 (1965), it was said that classification of a statute of limitations as "substantive" rather than "procedural" does not determine whether or under what circumstances the limitation period may be extended.

The Court went on to say (with reference to a federal statute of limitations) that "the basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances." *Id.* at 427.

For the reasons indicated by Mr. Justice Black for the Supreme Court in *Goldlawr*, I believe that Atkins, by commencing his Kentucky proceedings within the time period allowed under the Virginia statute of limitations, has shown that "proper diligence on the part of plaintiff which such statutes of limitations were intended to insure." 369 U.S. at 467.

Atkins' alleged injuries are severe, his claimed damages great. Five years have elapsed since commencement of the Kentucky proceedings, and trial on the merits still eludes him. I believe this court is not straitjacketed by *Guaranty* but is, instead, left free by the *Erie-Guaranty-Byrd-Hanna* doctrine to accord this plaintiff what all agree he ought to have in an honest and fair judicial system: adjudication on the merits.

I would reverse.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

Civil Action Number 67-C-13-D

DONALD T. ATKINS, *Plaintiff*

vs.

SCHMUTZ MANUFACTURING COMPANY, INC.,
Defendant

By: Ted Dalton U. S. District Judge

OPINION and JUDGMENT

This personal injury suit is brought to the court upon a jurisdictional basis of diversity of citizenship, and amount in controversy in excess of $10,000. The clearest way to present the issue before this court, is to begin with an examination of the facts.

Plaintiff, Donald T. Atkins, was injured on June 22, 1961, at South Boston, Virginia when he was caught in a machine manufactured and sold by defendant, Schmutz Manufacturing Company, Inc. The injury necessitated amputation of both of plaintiff's feet and the plaintiff spent a long period of time in various hospitals and rehabilitation centers. Plaintiff alleges that defendant was negligent in the design and construction of the machine which severly and permanently injured him, and plaintiff prays for judgment in the sum of $470,000.

At the time of the injury, defendant had, and apparently still has, its only place of business in Louisville, Kentucky. All of defendant's sales are made from Kentucky, and defendant employs no salesmen in Virginia.

The events in this case took place before the Virginia "long arm statute" was enacted in 1964, thus plaintiff concluded that the defendant would not be subject to suit in Virginia. Plaintiff brought suit against the defendant in the U.S. District Court for the Western District of Kentucky on June 19, 1963. The suit in Kentucky was brought more than one, but less than two years after the date of the injury. The statute of limitations applicable to plaintiff's cause of action is two years in Virginia (§ 8-24 Code of Virginia) and one year in Kentucky (KRS § 413.140). However, at the time plaintiff brought suit in Kentucky, prior cases held that the longer statute of limitations would govern in a suit filed in Kentucky, but based on a cause of action arising in a state whose statute of limitations was longer than the one year Kentucky statute of limitations. *Collins* v. *Clayton & Lambert Mfg. Co.*, 299 F.2d 362 (6th Cir. 1962). Thus, when plaintiff brought suit in Kentucky, the existing rule was to apply the longer statute of limitations, and plaintiff expected the Virginia two year statute of limitations to be applicable in his case.

While plaintiff's suit was pending in the U.S. District Court for the Western District of Kentucky, the Kentucky Court of Appeals held that if the statute of limitations in the foreign state is for a longer period of time than the one year Kentucky statute of limitations, the law of Kentucky would prevail. *Seat* v. *Eastern Greyhound Lines, Inc.*, 389 S.W.2d 908 (1965). Thereafter, defendant filed a motion for summary judgment, asserting the plea of the Kentucky statute of limitations. The U.S. District Court for the Western District of Kentucky stated that in diversity cases, it was bound to apply the state law as interpreted by the highest court of the state, and sustained defendant's motion for summary judgment. The judgment was affirmed by the U.S. Court of Appeals for the Sixth Circuit, and plaintiff is appealing the decision to the United States Supreme Court.

Plaintiff now brings his suit in this court on the jurisdictional basis of diversity of citizenship and amount in controversy in excess of $10,000. This suit is brought more than two years after the injury occurred, and defendant filed a motion for summary judgment, asserting the plea that the Virginia two year statute of limitations bars plaintiff's suit. Plaintiff answers that the running of the Virginia statute of limitations was tolled while his suit was pending in Kentucky. The merits of the proceedings in Kentucky are not before this court, and the sole issue of this case is whether plaintiff's abortive Kentucky action tolled the running of the Virginia statute of limitations.

Plaintiff cites *Burnett* v. *New York Central RR*, 380 U.S. 424 (1965), to support his contention that the Kentucky suit tolled the running of the Virginia statute of limitations. In *Burnett*, the United States Supreme Court held that the running of the F.E.L.A. statute of limitations was suspended when the plaintiff filed timely suit, even though the suit was later dismissed for improper venue. *Burnett* is not controlling in this case, because it was concerned solely with interpretation of a federal statute. Even though the F.E.L.A. provision and the Virginia statute be worded similarly, the construction placed on the federal statute is not necessarily the construction that must be placed on the state statute. This case is founded on diversity of citizenship, not federal statute, and the construction placed upon a state statute by the highest court of the state is controlling. Whether Virginia's statute of limitations be labeled substance or procedure, it clearly affects the outcome of this case and must be applied. *Guaranty Trust Co.* v. *York*, 326 U.S. 99 (1945).

The applicable statute of limitations covering plaintiff's cause of action is § 8-24 Code of Virginia (1950) which states: "Every action for personal injuries shall be brought within two years after the right to bring the same shall have accured." The right to bring suit accrues

at the time of injury. *Hawks* v. *DeHart*, 206 Va. 810, 146 S.E.2d 187 (1966). Those instances in which the statute of limitations is suspended are controlled by § 8-34 Code of Virginia (1950). § 8-34 is identical to older § 5826 Code of Virginia (1919), which was constructed by the Supreme Court of Appeals of Virginia in *Jones* v. *Morris Plan Bank*, 170 Va. 88, 195 S.E. 525 (1938).

The plaintiff in *Morris Plan Bank* had filed a timely suit which was later dismissed for lack of proper venue. When the plaintiff later brought suit in the proper forum, the defendant pleaded the statute of limitations as a bar. Plaintiff in *Morris Plan Bank* answered as the plaintiff here does, that the Virginia statute of limitations was suspended while his suit was pending in another forum. The Supreme Court of Appeals of Virginia rejected the plaintiff's contention, and held that the statute of limitations had run.

> An analysis of our statute (section 5826) shows that in only four instances is there a suspension of the statute of limitations by reasons of the pendency of a former suit brought in due time. These are (1) Where such suit abates "by return of no inhabitant," that is, where the writ is not served for that reason; (2) where the suit abates by reason of the "death or marriage" of a party; (3) where, after the plaintiff has obtained a judgment or decree in his favor, it is "arrested or reversed upon a ground which does not preclude a new action or suit for the same cause;" and (4) where "there be occasion to bring a new action or suit by reason of the loss or destruction of any of the papers or records in a former suit or action which was in due time."
>
> None of those provisions applies to the plaintiff's case. There is no saving provision where a suit, such as that of the plaintiff here, was brought in the wrong forum or was dismissed otherwise than upon the merits. *Jones* v. *Morris Plan Bank*, Supra.

Plaintiff contends that *Morris Plan Bank* is not controlling here because it was based on a legislative intent to insure that the statute of limitations would not toll when a plaintiff sues in the "wrong" forum. Thus plaintiff here contends that the rule in *Morris Plan Bank* should not apply to him because he did not sue in the "wrong" forum. Rather, he sued in a proper forum, which became improper only after a retroactive change in the applicable law. Even assuming that *Morris Plan Bank* should not be controlling here, the plaintiff has still failed to show a ground which would toll the running of the statute of limitations. There are no exceptions to a statute of limitations except those made by the statute itself. *Johnson* v. *Merritt*, 125 Va. 162, 99 S.E. 785, 789 (1919); *Clark* v. *Nave's Creditors*, 116 Va. 838, 83 S.E. 547 (1914); *Bickle* v. *Chrisman's Adm'x*, 76 Va. 678 (1882). "In the absence of statute, a party cannot deduct from the period of the statute of limitations applicable to his case, the time consumed by the pendency of an action in which he sought to have the matter adjudicated, but which was dismissed without prejudice to him . . . ." *Norwood* v. *Suffey*, 196 Va. 1051, 86 S.E.2d 809 (1955). Plaintiff has not brought himself within any of the four exceptions set out in § 8-34 Code of Virginia (1950). We do not agree with plaintiff that *Brunswick Land Corp.* v. *Perkinson*, 153 Va. 603, 151 S.E. 138 (1930), is helpful argument for plaintiff's position. The case held that the pending of the first suit did not toll the statute of limitations with regard to the second suit. The provision of § 8-34 dealing with an arrested or reversed judgment, clearly refers to a final judgment on the merits, and not to the tenuous ground put forth by the plaintiff that the Kentucky court made a tacit judgment on the Kentucky statute of limitations when it allowed plaintiff to use discovery methods to prepare his case on the merits.

Plaintiff contends that the equities are with him (which argument is appealing to this court) and that the only

court open to him was the Kentucky court which retroactively closed its doors to him. The sympathy of this court is with the plaintiff, "but neither mere difficulty nor inconvenience in seeking a legal remedy . . ." will toll the statute of limitations. "The peace of society demands that there should be, at some time, an end put to litigation . . . It is better than an individual should, in exceptional cases, suffer wrong, than a community should be kept in turmoil." *Johnson* v. *Merritt*, 125 Va. 162, 99 S.E. 785, 789 (1919). If the plaintiff has truly been done an injustice, his recourse is not in this court, but in appealing the decision of the Kentucky courts.

It is clear that under the Law of Virginia, the plaintiff here has not met any of the four provisions of section 8-34, which suspend the running of the statute of limitations. When jurisdiction is based on diversity of citizenship, this court must follow the law of the state where it sits, and hereby finds that the Virginia statute of limitations bars plaintiff's suit.

For the reasons stated in this opinion and upon mature consideration of the facts relied upon by plaintiff in the case at bar, this court feels that the plaintiff's suit is barred by the Virginia statute of limitations.

Therefore, it is hereby ADJUDGED and ORDERED that defendant's motion for summary judgment be, and hereby is granted. A certified copy of this opinion and judgment is directed to be sent to counsel of record.

ENTER THIS ORDER:

/s/ Ted Dalton
U.S. Chief District Judge
May 26, 1967

A TRUE COPY, TESTE:

Leigh B. Hanes, Jr., Clerk

By: Oda F. Haynes
Deputy Clerk